Office Supreme Court, U.S.
FILED

No. [redacted]

[redacted],
Appellant,

v.

[redacted],
Defendant,

and

[redacted],
Appellee.

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Form of Citations

Citations to the Record in this statement will appear in the following form: e.g. R. 69-32. The first number represents the number of a document or item as it appears in the Index to the Record on Appeal. The second number represents the page cited within the particular document. Thus the citation *supra* refers to page 32 of the decision of the court below which is Index number 69.

Where an item appearing on the Index as one document contains multiple documents or items it will be cited as follows: e.g. R. 41-82-N. This refers to page 11 of the Hearing Examiner's report contained in item number 82 of appellant's Appendix in the court below which has Index number 41.

The transcript of the hearings and exhibits before the ICC are included in Index number 53 which contains the ICC's entire file in this matter. These will be cited: e.g. R. 53-Tr. 793 or R. 53-Exh. 168 as the case may be.

Supreme Court of the United States

OCTOBER TERM, 1968

No.

INTERSTATE INVESTORS, INC.,

Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

and

TRANCONTINENTAL BUS SYSTEM INC., Intervenor-Defendant,

Appellees.

ON APPEAL FROM THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

This appeal is from an order made by a specially constituted three-judge District Court for the Southern District of New York entered on July 22, 1968, refusing temporary and permanent injunctive relief against the order of the Interstate Commerce Commission dated Au-

gust 10, 1966, a number of supplemental orders relating thereto and dismissing appellant's complaint.

The orders of the Interstate Commerce Commission intentionally created a national duopoly in the intercity bus industry to the exclusion of any third competitive force.* The Commission authorized acquisitions by appellee, Transcontinental Bus System Inc. (hereinafter referred to as "Transcon") of the last nucleus of independent intercity bus companies operating 10,860 miles of certificated bus routes (App. C, p. A98). The acquisition increased Transcon's mileage by 23.8% (*ibid.*) and increased its net operating profit by 58% (R. 53—Exh. 21).** According to Transcon's report to its stockholders, this constituted the most significant acquisition in the history of the bus industry [Annual Report 8 (1966)]. As one consequence appellant was excluded from the intercity bus industry, which appellant had sought to enter through acquisitions of some of the same properties acquired by Transcon.

Opinions Below

The opinion of the District Court is reported in 287 F. Supp. 374 (S.D.N.Y. 1968) and at R. 69 of the record on

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* Transcon in its initial brief to the Commission's Hearing Examiner presented the argument upon which it prevailed in the Commission as follows (App. H, p. A178):

> *"By approving these transactions, the Commission does create a duopoly within the bus industry,* one side of which will be considerably the weaker. True, *there is not then enough business left for the 'third force,' as proposed by Interstate."* (emphasis supplied).

** Earnings before acquisition $4,513,087; earnings after acquisition $7,141,746. The 37% figure in the exhibit does not properly reflect the actual increase.

appeal. It is also set forth in Appendix A hereto. The principal decision and order of the Interstate Commerce Commission is reported at 101 M.C.C. 529 and is included at R. 53. It is also set forth in Appendix B, hereto. The report and recommendation of the Hearing Examiner of the Interstate Commerce Commission is not reported; it is included at R. 41-82 and is set forth in Appendix C hereto.

Jurisdiction

Appellant brought this suit under 28 U.S.C. §§ 1336, 1398, 2284, 2321-2325 to set aside the above mentioned orders of the Interstate Commerce Commission and for temporary and permanent injunctive relief.

A temporary restraining order was issued on September 18, 1966 (R. 1), and was vacated on September 22, 1966 (R. 4). The complaint was filed on October 5, 1966 (R. 7). Hearing on issuance of temporary injunction took place on May 25, 1967 (R. 67). Upon this hearing, at the suggestion of the Court, all parties consented to submit the controversy for final disposition upon the basis of the briefs filed and arguments made at the hearing (*id.* at 14-15).

The order of the District Court denying injunctive relief and dismissing the complaint was entered on July 22, 1968 (R. 69) and notice of appeal was filed in that Court on September 20, 1968 (R. 70).

The jurisdiction of this Court to review the decision below by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of this Court: *United States* v. *Baltimore & O.*

R. R., 333 U. S. 169 (1948); *ICC* v. *Hoboken Manufacturers R. R.*, 320 U. S. 368 (1943); *St. Louis & O'Fallon Ry.* v. *United States*, 279 U. S. 461 (1929).

Questions Presented

1. (a) Are the orders of the Interstate Commerce Commission, creating a national duopoly in the intercity bus industry to the exclusion of any third competitive force, authorized by and appropriate under the Interstate Commerce Act (Section 5 and Section 20(a)) and the antitrust laws of the United States (particularly Section 7 of the Clayton Act)?

(b) Assuming that the Commission upon proper hearing and proper evidence would have had the power to create a duopoly in the bus industry, is the decision below a proper exercise of such power in the light of:

(i) refusal by the Commission to consider whether the preservation of a viable independent competitive bus system was in the public interest on the ground that there was not before the Commission a specific application for the preservation of such a system;

(ii) the specific refusal to consider appellant's evidence and argument as to the desirability of preserving a viable competitive force in the bus industry;

(iii) the absence of specific and adequate findings?

2. Did the Interstate Commerce Commision discharge its duties under Section 11 of the Clayton Act by dismissing without hearing a complaint filed under that section, charging, *inter alia*, antitrust law violations not previously immunized by the Commission, on

the ground that the Commission's decision in a proceeding under Section 5(2) of the Interstate Commerce Act was dispositive of the Clayton Act charges?

3. (a) Should the District Court have enjoined and vacated the orders of the Interstate Commerce Commission because Transcon prosecuted its application in the Commission in violation of 18 U.S.C. § 1505 by means of false and misleading evidence including, to the knowledge of Transcon's trial attorney, false testimony by the principal executive officers of Transcon and of one of the acquired bus systems?

(b) As disclosure of the facts concealed before the Commission were not made until briefs were filed and the argument held in the District Court, should the District Court at the very least have returned the matter to the Commission for findings of fact in the light of the disclosures?

4. If Part V of the opinion in the court below may be construed as an adjudication that appellant did not have standing to prosecute the suit, or some part of it, then the additional question arises: Did appellant have standing to prosecute the suit in the District Court?

Statutes Involved

The Commission's orders purported to be made under the authority of Interstate Commerce Act § 5(2), 49 U.S.C. § 5(2) (App. D, pp. A135-37). If the Commission's orders are upheld, the acquisitions approved obtained the immunity from antitrust laws specified in Interstate Commerce Act § 5(11), 49 U.S.C. § 5(11) (App. D, pp. A138-39).

Appellant charges that the acquisitions approved by the Commission under Section 5(2) were in fact consummated, or at least partially consummated, in violation of Section 5(4), 49 U.S.C. § 5(4) (App. D, pp. A137-38).

Appellant likewise contends that the Commission had no power to approve of the specific applications here involved under Section 5(2), citing, among other statutory provisions, the national policy of the Motor Carrier Act of 1935 (Act of Aug. 9, 1935, ch. 498, § 202(a), 49 Stat. 543; App. D, p. A134), as well as the national transportation policy stated in the consolidating amendment to the Interstate Commerce Act in the Act of September 18, 1940, ch. 722, Title I, § 1, 54 Stat. 899 (App. D, pp. A134-35).

Appellant also charges that the Interstate Commerce Commission failed in its duty under Section 11 of the Clayton Act to enforce Section 7 of that Act (15 U.S.C. §§ 18, 21; App. D, pp. A139-43).

Incidentally involved in appellant's charges concerning the prosecution of Transcon's application with false and misleading evidence, is the prohibition against such conduct found in 18 U.S.C. § 1505 (App. D, p. A144), and the prohibitions against perjury (18 U.S.C. § 1621; App. D, p. A145) and conspiracy (18 U.S.C. § 371; App. D, p. A144).

Appellant's argument spelling out motive for the false testimony and concealment of facts also involves a section of the Internal Revenue Code dealing with corporate acquisitions (Internal Revenue Code of 1954, § 368(a)(1)(B); App. D, p. A146).

Statement Of The Case

A. The Bus Industry And The Place of The Challenged Acquisitions Therein.

In 1964 the intercity bus industry carried passengers 22.7 billion passenger miles* as compared with 18.4 billion for the railroads (14 billion exclusive of commuter service) and 45.4 billion for the airlines (R. 41-4).

In this very substantial industry the Commission through a series of decisions had by 1964 permitted Greyhound to establish a major bus line system operating on a national basis.**

The other major, albeit somewhat smaller, national system was operated by appellee Transcon.*** From time to time Transcon, like Greyhound, had been permitted by the Commission to acquire independent bus lines and Transcon did so both inside and outside of the National Trailways System (a confederation of bus systems dominated by Transcon).****

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* A passenger mile is the transportation of one passenger for one mile (R. 53-Tr. 27).

** Greyhound has been granted approval for 121 acquistions of control between 1936 and 1963 (R. 53-Initial Brief of Transcon, Jan. 25, 1965, pp. 77-88; App. E, pp. A147-58).

*** Transcon, however, has grown by acquisition during the last decade at a rate far in excess of Greyhound's—*e.g.*, during the period 1952-1962, Greyhound's route miles increased only 5.5% while Transcon's almost doubled (94% increase) [*Greyhound Corp.-Control-Tex., N. Mex. & Okla. Coaches,* 101 M.C.C. 655, 673 n. 12 (1966)]. If the 10,860 route miles added by the instant acquisitions (App. C, p. A98) are added to the figures in the table just cited, then Transcon's increase in twelve years is 135%.

**** Transcon had obtained approval for 34 acquisitions of control prior to the present proceeding (App. E, pp. A159-63), has acquired

(*Footnote continued on following page*)

There remained as an independent competitive force a nucleus of bus lines based in the eastern and southeastern part of the United States. These controlled a north and south route along the Atlantic coast states from New England to Florida, and likewise formed an important link in a route competitive with both Greyhound and Transcon between the southwest and the northeastern seaboard. The principal independent companies which together with subsidiaries and affiliated companies constitute this independent nucleus were Queen City Coach Company (Queen), Safeway Trails Inc. (Safeway), Virginia Stage Lines Incorporated (Virginia), Carolina Coach (Carolina) and Tamiami Trailways (Tamiami).* They operated over 10,000 miles of intercity bus routes (App. C, p. A98).

(*Footnote continued from previous page*)

bus systems involved in this proceeding and has subsequently acquired three other bus carriers despite appellant's objection raised before the Commission that such added acquisition by Transcon in furtherance of Transcon's duopoly plan would be cumulative in effect and be violative of law. *Transcontinental-Control—Southern Stages and Atlantic Stages* MC-F-8738 decided June 28, 1968 and *Transcontinental-Control-Edward Motor Transit Co.*, MC-F-9860 effective July 19, 1968. By order served Aug. 5, 1968, in Dkt. MC-F-9638 the Commission refused to find that the issue of duopoly involved "issues of general transportation importance" as required under its Rule 1100.101(a)(4) and by order dated July 14, 1967 declined to stay the additional acquisitions pending resolution of the present proceedings now before this Court. The above acquisitions added 1080 and 1435 route miles to Transcon's operations (See R. 53 Exh. 74, pp. 4-6 for comparative revenue data on these companies). Edwards was not a Trailways member.

* The control of Virginia and Safeway assured control also of Trailways of New England and a one-third interest in Service Coach Lines. Control of Queen assured control over Smoky Mountain Stages, Georgia-Florida Coaches and Ft. Bragg Coach Company and (in conjunction with Virginia) of Tennessee Trailways, Carolina Scenic Stages, Coastal Stages Corporation and the Gray Line of Charleston, South Carolina (App. C, pp. A77-78, 83-84, 93).

The most strategically located of these lines was Queen. It was a key link in the independent competitive north-south route between New England and Florida and also furnished a key link in an independent competitive route between Texas and the Washington-New York-New England area (R. 53-Tr. 84, 384 & Exh. 2). Generally speaking, the Queen lines radiated from its headquarters in Charlotte, North Carolina to Atlanta, Chattanooga and Knoxville in the west, Lake City, Florida in the south, Charleston and Wilmington, North Carolina in the east and Raleigh-Durham in the north (App. C, pp. A93-94). Exhibit 39 before the Commission showing certificated routes of Continental Trailways after consummation indicates the precise location of the routes acquired by Transcon (which for present purposes is identical with "Continental Trailways") under the challenged Commission decision (R. 53-Exh. 39).

B. Appellant Interstate Endeavors To Become A Competitive Factor In The Bus Industry By Acquiring Queen.

"In the 1960's, Interstate and its President, Burt, became interested in welding the Trailways carriers running along the Atlantic Seaboard into a single unit" (App. A, p. A6). In this endeavor "to penetrate the intercity bus industry" Interstate "offered to purchase from their stockholders first Queen's shares and later those of Tamiami." (App. C, p. A105).* It was appellant's plan to acquire Queen and the companies controlled by it, then negotiate for the purchase of Tamiami Trailways connecting to

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* Tamiami operated from Atlanta to southern Florida (R. 53—Exh. 2).

the south and Carolina Coaches to the north (R. 41-8). Such acquisitions would achieve a system sufficiently comprehensive to stand on its feet and withstand the predatory practices of the two large competitors (Greyhound and Transcon) (R. 53—Tr. 1176-77), especially the routing of through traffic around any system which offered a threat of competition. Combination with Virginia Stage and Safeway could follow and the few isolated independents in the west could later become part of the third system (R. 53—Tr. 1174-93).

Appellant negotiated for many months with Queen executives and stockholders. Finally, in the spring of 1964, appellant believed the negotiations "had advanced to 'satisfactory stages of agreement'" (R. 41-82-18). The agreement involved acquisition of Queen and an affiliated company, General Realty and Insurance Corporation (GRIC)* and an intrastate bus carrier controlled by certain of Queen's shareholders (Eastern Carolina Corporation). The price was to be $250 cash per share for Queen and GRIC or a total of about eight million dollars, including Eastern Carolina (R. 41-13).

Interstate had obtained the necessary financing (R. 41-12). Plaintiff's accountants had been given access to the records of Queen (R. 41-15). Plaintiff's attorneys had contacted the Commission to determine the procedure required for obtaining the Commission's consent if that were deemed necessary (R. 41-17).

The agreement which Interstate had negotiated for the acquisition of Queen was, however, never consummated.

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* This corporation owned terminal facilities used by Queen City and also one-third of Georgia-Florida Coaches, a connecting carrier forming a part of the Queen City group (App. C, p. A93).

C. To Achieve The Duopoly Transcon Acquires The Bus System Which Plaintiff Had Sought To Acquire.

Unbeknown to plaintiff, at about the time when its negotiations with Queen had come to fruition, Transcon became active. Transcon had in the past been interested in acquiring Queen and had conducted casual on-and-off negotiations with several major Queen stockholders (App. A, p. A7). As the court below observed: "When it learned of the possible Queen-Interstate deal, * * * Transcon immediately started negotiating in earnest" (*ibid.*).

With this turn of events, the principal executives and stockholders of Queen delayed formalizing their agreement with appellant and finally, by letter dated April 28, 1964, spelled out terms upon which they would be willing to enter into an exchange of stock with Transcon at the rate of one share of Queen and GRIC stock for eight shares of Transcon stock (R. 41-20).

But Transcon was also advised in the letter of April 28 that "some of our stockholders wanted a minimum guarantee of cash and I [Love, Queen's president] enclose an offer by Transcontinental to buy back this stock for $31.25 per share. This is an integral part of our offer to sell the stock of Queen and General Realty and if it is not accepted the offer contained in the signed contracts is withdrawn" (*ibid.*). It will be noted that the cash buy back amounted to $250.00 per share of Queen and GRIC stock—the same amount at which appellant had negotiated for the cash purchase of such stock.*

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* The $250 per share minimum guarantee was subsequently repeated as a requirement needed to induce the Hardison (controlling more than twenty per cent of the Queen stock) family to accept Transcon's exchange of shares offer. (R. 53—Exh. B to Complaint in MC-C-4969, Minutes of Queen Board meeting of May 15, 1964, pp. 2-3).

The same letter imposed three other conditions upon a sell out to Transcon: (1) a satisfactory employment contract for Queen's president, Love, (2) a satisfactory arrangement to buy from the Queen stockholders stock of an affiliate bus line, Eastern Carolina Corporation, and (3) a satisfactory contract for the continuation of the purchase of parts and services from the Transport Supply Corporation, a corporation owned by some of the Queen stockholders (*ibid.*). The communication to Transcon concluded with the statement "All of the things set out in this letter are considered as integral parts of the whole trade and neither may be accepted without the acceptance of all" (*ibid.*).

The record shows no further communication between these parties until the purchase agreement dated "as of May 16, 1964" was submitted by Transcon to Queen (R. 41-21). This agreement contains none of the four integral conditions set forth in the letter offer from Queen. But it does provide in article IX, § 9.3 that the agreement is conditioned upon obtaining from the Internal Revenue Service a ruling letter to the effect that the exhcange of stock will not result in the recognition of gain or loss for federal income tax purposes (*id.* at 6-7). It is plain that as far as the formal contract was concerned the parties sought to cast the acquisition as a "B" reorganization in which the sole consideration* would be the voting stock of Transcon.

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* See Internal Revenue Code of 1954, § 368(a)(1)(B), construed to forbid any payment whatever except voting shares. *Helvering* v. *Southwest Consolidated Corp.*, 315 U. S. 194, 198 (1942); *Turnbow* v. *Commissioner*, 368 U. S. 337 (1961); Bittker and Eustice, *Federal Income Taxation of Corporations and Shareholders* 521-22 (2d ed. 1966).

But at some time Transcon had apparently agreed to the conditions of the April 28th letter. For, on May 21, 1964, the Queen board of directors, prior to ratifying the contract dated "as of May 16, 1964," passed a series of resolutions which, insofar as Queen was able to do so, fulfilled each of the conditions stated in the April 28, 1964 letter (R. 41-20a-2-3). The directors approved a new employment contract for Queen's president, Love; they approved a contract to purchase the stock of Eastern Carolina Corporation for cash; and approved a contract for the continuation of the purchase of parts and services from the affiliated Transportation Supply Corporation (*ibid.*). These actions were taken with the assent of Transcon because they occurred subsequent to May 16 (R. 53—Tr. 835-39, 884-85, 908-10).

At this time there was no evidence as to how the fourth condition of the April 28th letter had been complied with, nor how the parties had decided to resolve the dilema brought about by the conflict between the essentials of a "B" reorganization for tax purposes and the requirement of some of the Queen stockholders for cash. It is the subsequent discovery of how this dilema was resolved which gives rise to the charge that Transcon prosecuted its application in the Interstate Commerce Commission corruptly in violation of 18 U.S.C. § 1505 and initially continued its deception in the court below.

The May 16, 1964 agreement between Transcontinental, Queen and its stockholders provided for an exhcange of one share of Queen stock for 7.25* shares of Transcon

* The adjustment from 8 to 1 to 7.25 to 1 was effected to reflect the relative earning records of Queen and Transcon (R. 53—Tr. 141).

(R. 41-21-1). The participation of 80% of the stockholders of Queen was a condition of the contract (*id.* at 2).

The agreement required each Queen stockholder who became a party to the agreement forthwith to deposit his Queen stock with North Carolina National Bank of Charlotte as a depositary (*ibid.*). In exchange each stockholder would receive a transferable depositary receipt. The deposit was irrevocable as far as the stockholders were concerned. No Queen stockholder who had exchanged his Queen stock for a depositary receipt was entitled to withdraw the Queen stock unless the entire agreement should be terminated and notification of such termination had been dispatched to the depositary jointly by Transcon and Queen (*id.* at 2, 4). Upon the execution of this agreement the control over the disposition of nearly 100% of the Queen stock was thus effectively taken from the Queen stockholders and vested in Transcon (R. 53—Tr. 296-97). Appellant from that date on had no further opportunity to acquire the stock.

The exchange of Queen stock in the hands of the depositary for Transcon stock was to take place "when orders shall have been entered by the Interstate Commerce Commission * * * approving the transactions hereby contemplated" (*id.* at 4). Transcon agreed to apply to the Interstate Commerce Commission "for the approval of the transactions hereby contemplated" (*id.* at 3). Queen agreed to cooperate in the prosecution of the application (*ibid.*). The agreement contained a series of restrictions and special covenants (*id.* at 5-6), the effect of which was to forbid Queen without Transcon's consent to do anything other than continue its operation in status quo.

D. Transcon Secretly Acquires From Queen Stockholders Depositary Receipts Representing The Queen Stock, Thus Further Consummating The Acquisition Prior To The Required Approval By The Interstate Commerce Commission.

As was disclosed by appellees just prior to the argument in the court below, within less than thirty days after the approval of the Queen-Transcon agreement by the Queen directors, some of Transcon's principal executive officers and its attorney commenced acquiring from the Queen stockholders, who wanted cash, their depositary receipts for cash furnished by Transcon.* The acquisitions were concealed and made in the name of Swiss Highway Insurance Company of Zug, Switzerland, which, it later turned out, was an indirect subsidiary of Transcon (R. 53—Exh. 168).

These acquisitions were not minimal. They amounted to 10% of the total outstanding stock (22,264 shares) of Queen (App. F, p. A165). By such cash purchases of depositary receipts, Transcon acquired all rights to the Queen stock represented thereby, including all voting rights (R. 41-21-3). So Transcon partially consummated its contemplated acquisition of control over Queen before approval and authorization by the Commission as required under Section 5 of the Interstate Commerce Act, 49 U.S.C. § 5 (1-4). Such authorization was not forthcoming until August 10, 1966—more than two years after the first of the acquisitions for cash and almost a year after the last such acquisition (App. F, p. A167). This partial unauthorized consummation, especially as it was concealed,

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* (R. 54-40, n. 16; R. 57-25; R. 67-116. The foregoing are annexed hereto as Appendix F, pp. A164-67).

should, under previous decisions of the Commission, have been considered by the Commission in determining Transcon's fitness to be established as one of the sanctioned duopolists in the bus industry.

E. Simultaneously, Transcon Agrees Under Similar Contracts To Acquire The Principal Remaining Independent Intercity Bus Lines In The East.

Just prior to the acquisition of Queen, Transcon, on March 26, 1964, made an agreement to exchange its stock for the controlling stock of Virginia and on April 22, 1964, entered into a similar arrangement for the acquistion of Safeway stock (App. B, pp. A47-48). Prior to Commission approval, Transcon acquired 4% of the stock of Virginia by purchasing depositary receipts representing such stock, and also purchased 21% of the Safeway stock (R. 41-24-4).

As above noted, the foregoing acquisitions, together with the Queen acquisition,* eliminated, as Transcon admits (App. H, p. A178), the last opportunity for an independent competitive force in the bus industry as proposed by appellant. The acquisitions together covered over 10,000 miles of certificated routes, enlarged Transcon's mileage by almost 25% (App. C, p. A98), and increased its net operating profit by almost 60% (R. 53—Exh. 21). It was, as Transcon admits [Annual Report 8 (1966)], the most significant acquisition in the history of the bus industry.

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* This also included acquisition of 13% of GRIC which owned 33½% of Georgia-Florida.

F. Transcon's Application For Authorization Of Its Acquisitions By The Interstate Commerce Commission And Appellant's Intervention.

On May 7, 1964, Transcon filed its original application seeking authority under Section 5 of the Interstate Commerce Act to acquire Virginia and Safeway (Docket No. MC-F-8744) (App. B, p. A41). This application was supplemented by an application under Section 20(a) of the Interstate Commerce Act on the Finance Docket (No. 23123) under which Transcon sought authority to issue 824,158 shares of its common stock in order to implement the acquisition of Virginia and Safeway (*id.* at 42).

On June 5, 1964, Transcon filed its application in Docket No. MC-F-8774 to seek authority under Section 5 for the acquisition of Queen. On the same date it filed in Finance Docket No. 23159 an application under Section 20(a) to issue 219,356 shares of common stock in order to implement its acquistion of Queen (*ibid.*).

The applications in general were routine. The Queen application is significant in two respects: (1) The application was conditioned, as was the written agreement of acquisition, upon a ruling by the Internal Revenue Service that the exchange of Transcon stock for the Queen stock give rise to no recognition of any gain or loss for federal income tax purposes (App. A, p. A16); (Accordingly, without a ruling to that effect from the Internal Revenue Service the condition upon which the application was presented would not have come about and the Commission would not have been empowered to authorize the proposed acquisition); (2) Nowhere in the applications did it appear that, contrary to the terms of the acquisition agreement

presented to the Commission, Transcon, through the activities of its own officers and with its own funds, would, prior to Commission approval, acquire all rights in some 10% of the voting stock of Queen and 4% of the voting stock of Virginia.

The Commission recognized appellant as an interested party by permitting it to intervene in the proceedings in opposition to Transcon's application (R. 53—Tr. 89-93).

G. Transcon Adduced No Evidence Before The Commission To Show Any Public Or Private Necessity For Its Acquisition.

Transcon's various applications having been consolidated for hearing, such hearings commenced on September 9, 1964. The nature of the evidence presented by Transcon was largely routine. It consisted of standard financial statistics and information, description of routes, stereotyped evidence as to Transcon's fitness and ability and matters of that kind. Transcon in its case, while admitting that the acquisition would create complete duopoly in the bus lines to the exclusion of any third force (App. H, p. A178), made no effort to justify this state of affairs, as opposed to the continued existence of the independent bus lines forming the nucleus of an independent competitive force. Transcon's sole argument was that it was smaller than its partner in duopoly, Greyhound, and that accordingly it should be strengthened (*ibid.*).

Evidence to support the necessity of eliminating the remaining independent companies was totally lacking. The Examiner, for example, adopted as his own a statement by an authority in the bus industry that "under the steady hand of president Maurice E. Moore, Transcontinental, too,

makes a good thing of the bus business" (App. C, p. A116). That the evidence did not indicate any necessity for these acquisitions in order to keep Transcontinental competitive with Greyhound is obvious from the Examiner's finding that in spite of Greyhound's large size, "Greyhound's excess of passenger revenue over expenses is minimal" (*id.* at 117-118).

As far as the acquired companies are concerned, the evidence did not show that any of such companies were in poor financial condition or were in any way unable to serve the public adequately. Indeed, Transcon, in its brief in the court below, well summarized the evidence on this point as follows (R. 57-62):

> "Each of the companies acquired are excellent properties. Each was in good shape financially (See Exs. 53, 54, 77, 78, 130, 131), has a sufficient fleet of modern, well-equipped buses (Exs. 45, 70, 71, 118, 119, 120; Tr. 602-603) and maintains adequate terminal facilities (Tr. 592, 458)."

So it is undisputed that the duopoly was not required to preserve the status of the acquired companies.*

Through service by pooled operation over the routes in question existed without any acquisition by Transcontinen-

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* The foregoing is a complete answer to the Commission's contention in the court below (R. 54-19-20) that a denial of Transcon's application "would have left Transcon and the three companies to struggle against Greyhound competition". There is no finding and no evidence in this record to the effect that either Transcon or the three independents which it absorbed were engaged in a struggle against insuperable odds. Indeed, as we have shown above, the evidence is quite to the contrary. In fact, when Transcon distributed 51% of the shares of Western Sales, Ltd., to Transcon's shareholders, it surrendered without return $1.2 million in income per year (R. 41-62—consolidated earnings statement).

tal (See, *e.g.*, R. 53—Tr. 381-382, 384). Such routing operated smoothly for all parties concerned were interested in maintaining the best through schedules in order to obtain the business (R. 53—Tr. 385-386):

> "We found that everyone involved was most anxious to establish these through services so we could get some people using our buses. And you just don't find that there is a lot of squabbling * * *."

An officer for one of the acquired companies, testifying to the pool operations taking place prior to the acquisition, reaffirmed the proposition: "We have had very close cooperation, and over the years never the least bit of friction in the operation of the three companies" (R. 53—Tr. 1151). So the record would not support a finding that the independent companies which Transcon sought to acquire failed to give adequate service to the public either individually or as part of the joint operation. And no such finding was made.

The record here is even deficient in the usual stereotyped evidence relating to expected economies and savings resulting from the proposed acquisitions. There was testimony as to vague hopes for such economies but no *pro forma* statement or substantiating exhibit among the 168 exhibits showing any dollar savings actually forecast was ever submitted (R. 53—Tr. 463). The claimed savings related to dubious economies from expected increased purchasing power, not from lower operating costs (R. 53—Tr. 401, 441).

So the record here gives rise to the same suspicion voiced in the dissent in *McLean Trucking Co.* v. *United States,*

321 U. S. 67, 94 (1944), that "the hand of the promoter seems more apparent than the transportation need."

Experience has reinforced suspicion. Hard on the heels of Commission approval in this cause, Transcon has been involved in a series of additional mergers and acquisitions both within and outside of the bus industry.*

H. Appellant's Evidence As To The Desirability Of Preserving An Independent Third Competitive Force Is Rejected.

Appellant, as intervenor, endeavored to establish its thesis that the real issue before the Commission was the public interest at stake in the establishment of a duopoly and the undesirability of eliminating from the competitive scene the last nucleus of independent intercity bus lines. In this endeavor appellant met with no success either before the Examiner or the Commission. It was the Examiner's view (R. 53—Tr. 1096):

> "Well, that is not the problem before the Commission. The Commission has a specific case before it. It either approves it or denies it."

Appellant produced an expert witness to show an alternative to combining the independent southeastern companies with Transcontinental. As to such evidence, again the Examiner took the position (R. 53—Tr. 1173):

> "But the Commission has no application or had no application for any form of approval as a result of

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* See p. 7, n. * * * *, *supra*. On June 17, 1968, Transcon also acquired a 97% interest in Delta Steamship Co., 34 Standard & Poor's Corp., Over the Counter & Regional Exchange Stock Reports, § 33 at 5358 (Aug. 2, 1968).

> that study, and the Commission can only act on matters before it."

Appellant suggested to the Examiner (R. 53—Tr. 1174):

> "You are being asked to decide the future of the inter-city bus industry in the United States, and there are no other alternatives before you."

to which the Examiner replied (R. 53—Tr. 1174):

> "The Commission can only act on what is before it. I don't want to discuss it any more."

Appellant also moved that application be made to the Commission for the assignment of an advisory economist who would "file an advisory brief with the Examiner so that the Examiner will have available for the record material relating to monopoly aspects of this acquisition proposal" (R. 53—Tr. 1103). Transcon's counsel made strenuous objection to this application (R. 53—Tr. 1108-1112). The Examiner denied appellant's motion but permitted appellant to apply to the Commission which, according to the Examiner, "has the power to supply me with economists or any other advisor" (R. 53—Tr. 1112). Such application having been made, appellant was advised on the last day of the hearings, "Commissioner Tuggle has denied your request, Mr. Burt, for the hiring or having the Commission have an economist at this hearing to represent the public interest" (R. 53—Tr. 1282).

In his report the Examiner, referring to what he considered appellant's improper endeavor to adduce evidence relating to the desirability of keeping alive a third competitive force, noted that appellant had been admonished to

desist from offering irrelevant evidence, such as its question of a Transcon witness (App. C, p. A123):

> "I want to ask this witness whether this group [of independent companies on the Eastern Seaboard], as a third force in the industry, would constitute a viable, efficient economic unit."

The Examiner bolstered his rejection of such evidence by emphasizing that "The Commission 'has no application * * * for any form of approval as a result of' [plaintiff's study concerning the viability of a third competitive force] and the Commission can only act on matters before it" (*id.* at A125).

So, the Examiner rejected without resolution the key question: Does the public interest call for duopoly or the preservation of viable independent competitive bus systems? The Commission concurred (App. B, pp. A65-66). There is no indication, either by the Commission or the Examiner, as to the type of application appellant could have filed to bring before the Commission the basic issues of public interest which should have been disposed of in deciding the Transcon application.

I. The Examiner's And The Commission's Decision Lack Appropriate Findings On The Antitrust Law Issues.

The Examiner's decision was served on November 1, 1965. A great deal of it concerns itself solely with the usual ritualistic propositions. For example, pages are spent in discussing the corporate history, affiliation, operations and financial data of Transcon and of the acquired companies and a review of the acquisition agreements (App. C, pp. A77-98). There is a similar review of the corporate position of the protestant Greyhound

(*id.* at A102-05). The contentions of the parties are briefly stated (*id.* at A107-10). Two pages are devoted to discussing public interest (*id.* at A98-102). From this discussion it appears that the acquired companies, as independent operators, cooperated extensively in through service pooling arrangements, a proposition fully supported by the evidence (R. 53—Tr. 428, 680, 924). There is no finding that such arrangements did not meet the public's requirements.* There is no condition in the order which would require any better through service under Transcon's ownership than had theretofore been furnished under the pooling arrangements which involved Transcon, among other companies, and, to a lesser extent, Greyhound. While the Examiner speaks about conveniently coordinated schedules and more efficient use of equipment (App. C, p. A122), no facts are found to indicate either that more efficient use of equipment will in fact be made or that the through schedules will be any better coordinated than they had been under the extensive National Trailways Bus System pooling arrangements in which all carriers involved are found to have participated (*id.* at A80).

All corporations involved were in healthy financial condition (R. 57-62). There is no finding that the duopoly created to the exclusion of any independent competitive force is required to preserve any of the acquired bus lines or Transcon.

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* The examiner's reference (App. C, p. A101) to one situation in which a single scheduled through service was partially eliminated by Transcon (because Transcon's leg of the journey was unprofitable) is not only *de minimis*, but is totally irrelevant for the Commission's order does not require Transcon to restore this or create any other through service in the public interest.

On the antitrust issue, the Examiner addressed himself entirely to the question of enhancing Transcon's position vis-a-vis Greyhound. As we have pointed out above, the Examiner refused specifically to consider appellant's argument or evidence that the maintenance of a third competitive force in the industry would be desirable. He held that there was no application before him to justify such inquiry (see pp. 21-23, *supra*).

The Examiner's recommended order permitted all of the acquisitions for which Transcon had applied, attached no conditions as to operations and required no guarantees as to continued or extended through service or any conditions of any other kind for the protection of the public (App. C, pp. A130-33).

Insofar as here material, the Commission, in its decision rendered August 10, 1966, merely affirmed the Examiner's opinion without adding anything thereto (App. B, p. A40). The Commission's opinion also contains several pages of formal recitals dealing with the parties and the agreements (*id.* at A40-49). The contentions of the parties are summarized (*id.* at A49-58). Thereafter certain contentions of Greyhound and Investors are discussed briefly. Appellant's antitrust arguments are given short shrift (*id.* at A61-64).

Concerning appellant's argument that a third competitive force should be permitted to exist, the Commission approved the Examiner's piece by piece approach to industry-wide duopoly, stating that "no application has been filed for the consolidation of any of the several carriers herein involved under the ownership of Investors for the creation of such a "third force." (*id.* at A65). The Commission takes the position that there is no reason why

there should be more than two bus lines in the field and that the question is whether the applicant will provide an improved service to the advantage of the riding public (*id.* at 65-66). The Commission, as did the Examiner, makes no findings as to any shortcomings in the operations of the acquired companies as independent operators. It makes no findings as to how the riding public is to be advantaged and it attaches no conditions to its approval of the acquisitions which would require any better or increased or more efficient through service or reduction in cost to the public. It made no findings as to the impact of Transcon's emphasis on "through service" (R. 53—Tr. 347) upon the requirements of local and regional service more adequately supplied by smaller carrier (R. 53—Tr. 760; also see discussion in R. 53—Appellant's Exceptions dated Jan. 3, 1966 at pp. 3, 44-6).

J. The Corrupt Prosecution Of Transcon's Application In The Interstate Commerce Commission By Means Of Testimony Known By Transcon And Its Counsel To Be False.

Appellant, having negotiated at length with stockholders of Queen for acquisition of their stock, was well aware of the requirement by some of the stockholders for cash as a condition to consenting to the sale of their stock (see pp. 11-12, *supra*).

Appellant, believing that cash must have been assured to such stockholders and, indeed, paid in some fashion for the stock as part of Transcon's acquisition of Queen, sought from the inception of the hearings before the Interstate Commerce Commission to obtain the facts. If, as appellant believed, Transcon had acquired Queen shares for cash, then (1) the acquisition by Transcon was not in fact

as portrayed to the Commission in Transcon's application for Commission approval; (2) there would have been a partial consummation of Transcon's acquisition prior to the approval by the Commission. Such a state of facts, in appellant's view, would have shown a violation of Section 7 of the Clayton Act and would further have placed in issue Transcon's fitness to be awarded by the Commission the routes which it sought to acquire.

Accordingly, appellant sought by cross-examination to discover if and how cash was channeled to the Queen stockholders in a transaction which had been cast as a stock only "B" reorganization for obvious tax reasons. The most probable method for placing cash in the hands of the Queen stockholders who demanded it appeared to be the purchase of depositary receipts.

Appellant directed its search for the truth in that direction. Transcon's financial vice president, Scheitel, testified on September 10, 1964 before Examiner Winson. There is no doubt that Scheitel's testimony on cross-examination was intended to leave the impression that Transcon was not a party to any commitment involving the purchase of the depositary receipts for cash, that it did not know who had bought the depositary receipts and that Transcon's only participation in the matter had been to suggest the possibility that Goodbody & Co., which was making a market in defendant Transcon's stock, might possibly be interested in "making a market" for depositary receipts (R. 53—Tr. 200-204; App. G, pp. A168-71).* The following are examples of this testimony:

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* This at a time when he, himself, had personally engaged in buying the depositary receipts with Transcon's funds for a Transcon subsidiary (App. F, p. A166).

"Q. And, to your knowledge, have the trust [depositary] receipts been marketed?

A. I understand, I think somebody sold, yes." (*id.* at A168)

"Q. You at no time discussed with any member of the Love family, or any other principal stockholder—there are five principal stockholders of Queens—the relative amount of discount that would be available to them at Goodbody and Company, that it would be ten or fifteen percent over the equivalent market price of shares of Trancontinental Bus System?

A. I don't—we didn't even—there wasn't any assurance on our part at all that there was going to be a market for the depositary receipts." (*id.* at A169)

"Q. But you know that some [depositary receipts] has been sold?

A. I don't know who bought it." (*id.* at A170)

The Interstate Commerce Commission hearings recessed for a time. Plaintiff, having previously commenced breach of contract and common law tort actions in the United States District Court for North Carolina against stockholders of Queen, conducted some discovery proceedings in those actions during the recess. Appellant discovered for the first time that there had in fact been substantial sales of depositary receipts by Queen stockholders, including L. A. Love, president of Queen, and his son (R. 41-34).

According to Love, his depositary receipts were sold through an entity known as First Securities Corporation of Durham, North Carolina. He perpetuated the impression created by Transcon's Scheitel that Transcon had no connection with the purchases of the depositary receipts

(App. G, pp. A172-74). Love denied stoutly that he knew for whose account First Securities had purchased the stock. He claimed that he had selected First Securities by chance and that he did not know who had bought the depositary receipts of the other Queen stockholders (R. 53—Tr. 851-53, 865; App. G, pp. A172-74). Love reiterated that he did not know who bought the depositary receipts (*id.* at p. A174):*

> "Q. Do you know, Mr. Love, who actually bought your depositary receipts?
>
> A. No, sir, I don't. The security company on here sent me a check for them that's all I know."

Shortly thereafter, M. E. Moore, president of Transcon, fully supported the impression which his vice president, Scheitel, and Queen's president, Love, had sought to leave, *i.e.*, that the purchasers of the depositary receipts were wholly unknown to Queen and Transcon and that Transcon had absolutely no part in furnishing the funds for purchasing such securities. For example, Moore testified (R. 53—Tr. 971-73; App. G, pp. A174-76):

> "I am kind of curious about these transferable depositary receipts, Mr. Moore. *Will you* answer this question for me? *Do you know, first of all, have you, or any officer, to* your knowledge, of Transcontinental, Continental, *or its subsidiaries, agreed, by contract or by oral agreement, to supply the funds necessary to*

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* But the fact was that his depositary receipts were bought for Transcon's Swiss subsidiary with Transcon funds by the very officers of Transcon with whom Love had just recently negotiated the Queen stock acquisition (App. F, p. A167; R. 53—Tr. 199, 252-53).

purchase the depositary receipts or to make a market in these depositary receipts?
A. *They have not.*"

• • •

"Q. And a final question: What you are saying here in this hearing is that you know nothing about the market that was made in these transferable depositary receipts?

A. I don't know that there is a market as such.

Q. But you did seek—

A. I understood from the testimony yesterday that there had been some trading. I mean, is this one, or is this ten trades, or one trade, or a hundred trades? How many, I have no knowledge of.

Q. *And you are also saying whether there was one or ten, you know not how the trade or how the market was set up?*

A. No. *Transcontinental has no commitments. I mean, we have no part of it.*" (emphasis supplied).*

The foregoing testimony by the three principal executive officers of the corporations involved in Transcon's acquisition of Queen was to the knowledge of Transcon's counsel before the Commission, Goff, false and misleading (App. F, p. A164). This was never discovered during the proceeding in the Interstate Commerce Commission but was, for the first time, brought to light by *ex parte* investigation by the Commission's attorney, the result of which was casually added as a footnote to the Commission brief in the court below, filed just prior to the argument in

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* But at this time every acquisition of depositary receipts had been made with Transcon's funds through the agency of Transcon's executive officers and counsel and by a subsidiary of Transcon (App. F, p. A164).

that court (*id.* at A164). It now stands as admitted that all of the purchases of depositary receipts were made by Goff, Transcon's general counsel and its counsel before the Commission, by Scheitel, Transcon's vice president and witness, and by two other officers of Transcon (*ibid.*).

What is more, while title to the depositary receipts was taken by a Swiss subsidiary of Transcon, it was conceded on the argument in the court below by means of an exhibit handed up by counsel for Transcon that the funds for the purchase of the depositary receipts were Transcon's (R. 67-116; App. F, p. A167).

On the argument, counsel for the Interstate Commerce Commission for the first time conceded as to the Scheitel-Love-Moore testimony (R. 67-126; App. F, p. A166):

> "Now, it is our position on this that we are not vouching for the credibility of the testimony of the witnesses insofar as they gave testimony which may be read as denials of knowledge of purchases. If the testimony can be read that way, and some of it can, it is false, and it is clearly false as to Sheitel who is named as one of the four people that did the buying. There is no question about that."

While for some reason Scheitel is singled out in this admission, it applies equally to Love and Moore who denied even more stoutly knowledge of purchases of the depositary receipts.

K. Appellant's Unsuccessful Efforts To Bring Before The Commission The Issue Of False Testimony.

As we have stated, the disclosure belatedly made in the court below had never been made while the proceedings

were pending before the Interstate Commerce Commission. On the contrary, Transcon concealed the truth.*

It was only through appellant's persistent effort that at least some of the truth came to light. In this effort appellant fought alone with no cooperation from either Transcon or the Commission.

Appellant had called the attention of the Internal Revenue Service to the fact that depositary receipts had been acquired by someone for cash (R. 41-42). As a consequence, the Examiner for the Internal Revenue Service, who had initial responsibility for passing upon the request of the parties for a ruling that the acquisition was without tax consequence, called Hunter Jones, the attorney for the Queen stockholders to inquire as to the existence of cash purchases which had not been disclosed in the application (R. 41-43). Jones, in turn, called Transcon's counsel, Goff, and, for the first time, learned that the depositary receipts had been acquired by a Swiss subsidiary of Transcon (*ibid.*). This discovery made in November 1964 embarrassed Jones who had been present at the Commission hearing when his client Love denied all knowledge of who bought the depositary receipts (*ibid.*). But Jones' embarrassment did not cause him or Goff to request a reopening of the proceedings before the Interstate Commerce Commision or to make any disclosure on the record. Indeed, no answer was even made to the Internal Revenue Service until several months later when a Washington tax attorney

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* R. 53—Transcon Reply to Petition for Further Hearing, Nov. 5, 1965, p. 4; Transcon Reply to Exceptions, Feb. 14, 1966, pp. 73-74; R. 57-10, n. 2.

made the disclosure in February of 1965* (*ibid.;* R. 53—Exh. 168).

There the matter rested for another six months. Then the IRS, on the basis of the facts made known to it (not including, of course, the facts subsequently admitted in the court below), and certain other facts which, if known, might have lead to a different result (R. 59-87), gave a favorable tax ruling on the Queen-Transcon acquisition (R. 53—Exh. 168).

To satisfy the condition in Transcon's application to the Interstate Commerce Commission, the tax ruling was filed as an exhibit in June of 1965 (R. 53—Exh. 168). The ruling contained a recital of facts upon which the Internal Revenue Service had acted, including the following (*id.* at 2):

> "Transcontinental does not own stock (or depositary receipts representing stock) of Queen or Realty. However, Highway Insurance Company, of Zurich, Switzerland, a wholly-owned subsidiary of Western Sales, Limited, a Bahamian corporation, 49 percent of the stock of which is owned by Transcontinental, has purchased depositary receipts representing 1,387 shares of Queen and 829 shares of Realty.
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> * * *
>
> "It is stated that there is no commitment, formal or informal by Transcontinental or any one acting on its

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* The disclosure was not made until Transcon believed that Queen stockholders had purchased appellant's silence. In view of the false Moore-Scheitel-Love testimony, appellant could see no purpose in continuing its struggle further and so settled its North Carolina contract action for a nominal payment. Although Transcon had not been a party to the North Carolina action, it insisted upon receiving simultaneously an agreement from appellant that it would, among other things, abandon its objections to the Transcon acquisitions in the Interstate Commerce Commission (R. 41-41).

behalf to purchase Transcontinental stock from any of the shareholders of Queen or Realty after consummation of the proposed exchange, or to purchase depositary receipts *before* that time." (Emphasis supplied.)

While the record thus, for the first time, contained a modicum of evidence as to the untruth of the Scheitel-Love-Moore testimony, the disclosure to the Revenue Service was itself incomplete. The Internal Revenue Service had not been told that Transcon through its officers and with its funds, had purchased the depositary receipts even though such purchases were nominally made in the name of its Swiss subsidiary and it subsequently appeared that when some of the depositary receipts were acquired in the Swiss corporation's name, that corporation was in fact a 100% owned subsidiary (R. 57—10, n. 2 & App. F, p. A164).*

When appellant, as a party to the Interstate Commerce Commission proceeding, received a copy of Exhibit 168, it filed various applications, all designed to reopen the case in the light of newly discovered evidence so that a proper determination could be made concerning the part which Transcon and its witnesses had actually played in the cash acquisition of the depositary receipts.** All such efforts

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* A difference which the author of the tax ruling considered material (R. 59-87).

** R. 53—Letter dated August 20, 1965, Requesting I.C.C. to Issue Clayton Act Complaint; Application to Examiner to Reopen Hearings, September 20, 1965; Petition to I.C.C. to Reopen Hearings, October 11, 1965; Petition for Reconsideration of Denial of Further Hearings, December 7, 1965; Letter dated December 8, 1965; Exceptions to Examiner's Report, January 3, 1966; Petition to Admit Additional Exhibits, February 21, 1966; Motion, February 24, 1966; Reply Briefs, February 28, 1966, March 1, 1966; Petition, May 26, 1966.

were summarily denied by the Commission without ever making a determination on the merits.*

Such denial followed vitriolic arguments by Transcon's attorney Goff charging appellant's counsel with all types of improper conduct for having the temerity to suggest that in view of the recent disclosure the witnesses tendered by Transcon might have committed perjury (R. 53—Initial Brief of Applicant, January 10, 1965, p. 100; Reply of Transcon to Petition by Interstate Investors, Inc. for Further Hearing, December 27, 1965, p. 7; Reply of Applicant to Exceptions, February 14, 1966, pp. 34, 36; in Ex Parte 65 (Sub. No. 3) Reply of Transcon, pp. 13-15).

The tenor of these arguments may be judged from the following statement in a formal printed brief before the Commission (Reply dated February 14, 1966, p. 34, *supra*):

> "There is not one shred of evidence in this Record, except the self-serving declarations and allegations of Burt [appellant's president and counsel] that Transcontinental made any arrangement or agreement with any stockholder of Queen, General Realty, Virginia or any other of the carriers here sought to be acquired, to supply cash for the purchase of the depositary receipts; or to agree that said depositary receipts would be purchased; or to set a price to be paid for them. This is another one of those many claims which Burt has repeatedly made, based only upon his own allegations and declarations supported by no evidence of Record."

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* R. 53—Order Denying Petition to Reopen Hearings, November 25, 1965; Order Denying Reconsideration of Foregoing Order, August 10, 1966; Order Denying Stay of Section 5 Decision and Order, September 16, 1966; Order Denying Reconsideration of Section 5 Decision, November 16, 1966; Order Dismissing Clayton Act Complaint, May 18, 1966.

Counsel filing this document knew at the time it was filed that he had personally, along with three officers of Transcon, including the witness Scheitel, participated in all the purchases of depositary receipts with cash supplied by Transcon (App. F, pp. A164-67). This it is submitted was more than non-disclosure. It was active concealment of the truth.

L. Neither The Examiner Nor The Commission Made Findings Or Reached Conclusions With Respect To The Actual Facts Now Disclosed In Connection With The False Evidence Tendered By Transcon.

While appellant's application to reopen the hearings was pending the Examiner handed down his decision (App. C, p. A77). By way of a footnote (*id.* at A126, n. 15), the Examiner referred to the facts outlined in the letter ruling from the Internal Revenue Service (R. 53—Exh. 168). He did not weigh these disclosures against the Scheitel-Love-Moore testimony. He made no findings of fact as to the truth or falsity of the testimony now conceded to be false. He drew no conclusions concerning apellant's argument that, if the testimony were false and if Transcon had in fact acquired the depositary receipts, then there was a partial consummation of the transaction which had not been disclosed to the Interstate Commerce Commission, and, further, that there was a violation of Section 7 of the Clayton Act by virtue of such acquisition without prior approval by the Commission. Whatever might be the posture of the case, had the Examiner come to grips with this contention, the fact is that he failed entirely to do so.

The Commission's decision is similarly defective. The Commission fortified its prior failure to grant appellant opportunity for further hearing in the light of the disclosure contained in the Internal Revenue Service tax rul-

ing by refusing to accept and to consider additional data tendered by appellant (App. B, p. A68).* Respecting appellant's contention as to the purchase of depositary receipts, the Commission, as did the Examiner, simply recited the disclosures in the Internal Revenue Service tax ruling and concluded without more that the acquisition of some 10% of the Queen stock and 21% of the Safeway stock did not warrant a finding that Transcon has acquired control of those corporations (a totally irrelevant conclusion) (*id.* at A60). The Commission's only other reference to the depositary receipts is a conclusion that the purchase of the depositary receipts by Transcon's Swiss subsidiary did not constitute "a partial consummation of the transactions, which are based on an exchange of shares of Transcon's stock for shares of stock of the carriers to be acquired." (a complete *non sequitur*) (*ibid.*).

The Commission did not pass at all upon appellant's basic argument that while an exchange of stock was the ostensible method for Transcon's acquisition of control over Queen, in fact cash acquisition was also involved. The

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* After the disclosures contained in Transcon's late-filed Exhibit 168 (R. 53) appellant attempted to introduce additional evidence and to have the hearings reopened. The Commission denied appellant's request on the basis of Rule 86 of the Commission's General Rules of Practice which provides in part that: "the Commission will not receive as evidence or consider as part of the record any documents, letters or other writings submitted for consideration in connection with any proceeding after closing of the hearing * * *." The Commission stated: "to accept and consider such late-filed exhibits and additional data, in the absence of a stipulation that same might be filed, would be deprivation of the right of applicants to cross-examination thereon" (App. B, pp. A68-69). The Commission, however, was not troubled by the fact that appellant was deprived of such rights with respect to the tax ruling letter, late-filed Exhibit 168 which contained information directly contrary to the facts as stated by applicant's witnesses at the hearing (see pp. 26-31, *supra*).

Commission did not weigh the Scheitel-Love-Moore testimony against such disclosure as appellant had been able to call to its attention. The Commission did not purport to pass judgment on the facts disclosed much later in the court below, all of which indicated only too plainly that the Scheitel-Love-Moore testimony was designedly false and that Transcon's counsel was well aware of its misleading nature. Had enough facts been in the record, the Commission would have had to conclude that a secret, unapproved, partial consummation of the acquisition transaction had taken place.

Accordingly, the Commission never decided the basic question as to Transcon's fitness to become the anointed second member of a duopoly. Such fitness might well have been found lacking.*

The Questions Presented Are Substantial

The questions presented raise basic issues in the bus industry not previously decided by this Court (1) respecting the accommodation between the Motor Carrier Act, now a part of the Interstate Commerce Act, on the one hand, and the antitrust laws on the other and (2) the effect of false testimony and deliberate concealment of facts upon Commission proceedings.

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* Compare the Commission's own prior decisions which condemned secret partial acquisitions prior to Commission consent and denied application by those lacking respect for the law (*Gilbertville Trucking Co.* v. *United States*, 371 U. S. 115 (1962); *Lombard Bros., Inc.* v. *United States*, 226 F. Supp. 905 (D. Conn. 1964); *Watson Bros. Transp. Co-Lease-Burnett & Feighner*, 55 M.C.C. 277 (1949); *Brown Express-Purchase-Jones Motor Freight Lines, Inc.*, 55 M.C.C. 127 (1948); *Raymond Bros. M. Transp. Inc-Purchase-North American*, 37 M.C.C. 431 (1941). The prosecution of an application with false testimony would show a stronger propensity for illegal action than the conduct condemned in the determinations just cited (*F.C.C.* v. *WOKO, Inc.*, 329 U. S. 223 (1946)).

FIRST—The Commission's Decision Created A National Duopoly In The Bus Industry To The Exclusion Of Any Third Competitive Force In Violation Of The Commission's Duties, Both Substantive And Procedural.

Transcon, in total disdain of the antitrust laws, requested Commission approval of its vast acquisitions with the argument that such approval would create a "duopoly" within the bus industry on a nationwide scale as a consequence of which "there is not then enough business left for the 'third force' as proposed by Interstate" (App. H, p. A178).

Transcon's acquisitions were at least hastened by its decision to exclude appellant from the bus industry (App. A, p. A7).

The Examiner steadfastly, throughout the hearings and in his ultimate report, adhered to the opinion that he was concerned solely with the technical aspects of Transcon's acquisitions covered by its applications and the effect which such acquisitions might have on competition between Transcon and the other large established bus system, Greyhound pp. 21-23, *supra*). The Examiner refused repeatedly to permit applicant to establish that the acquired independent companies constituted a viable, independent force which should be permitted to remain independent of the duopolists (*ibid.*). The Examiner was of the opinion that evidence to establish the foregoing was wholly irrelevant to his inquiry because he did not have before him an "application" as to such independents (*id.* at 21-22). The Commission's decision followed the Examiner in all these respects.

We have summarized in the statement the total lack of findings and conclusions either by the Examiner or the Commission to justify the creation of a nationwide duopoly in the bus industry (pp. 23-26, *supra*). There simply are no facts found which would justify this drastic limitation of competition, existing and prospective. It must be recalled that there is no finding that Transcon was in any sort of financial difficulty. Indeed, as the Examiner pointed out, "Transcontinental, too, makes a good thing of the bus business" (App. C, p. A116), and it is likewise conceded that "each of the companies acquired are excellent properties. Each was in good shape financially * * * has a sufficient flow of modern, well-equipped buses and maintains adequate terminal facilities." (R. 57-62).

There is no finding that the acquired bus systems, including their pooling arrangements, did not give to the public adequate through service as well as local service (pp. 19-20, *supra*). There is no finding of any specific benefit to the public and Transcon's witnesses indicated that it and Greyhound would concentrate on "through business" (R. 53—Tr. 347) with no indication of how the interests of local and regional passengers were to be protected.

A. The Challenged Acquisitions Violate Section 7 of the Clayton Act.

As of the time of the proceedings in the Commission, Class I intercity bus carriers operated nationwide 783,189,000 vehicle miles and had total operating revenues in the amount of $527,829,000. Greyhound accounted for 447,814,000 vehicle miles* or 57% and obtained operating revenues

* Greyhound operates over 92,084 route miles (App. C, p. A102) which serve many major communities not served by Transcon or

(*Footnote continued on following page*)

of $323,388,000 or 61% of the total for the industry. Transcon, including the acquisitions for which approval was sought (64,611,120 vehicle miles), operated 184,900,000 vehicle miles (24%) and had operating revenues of $94,-296,351 (18%)** Transcon's acquisitions climaxed a rapid growth by numerous acquisitions which in a dozen years had increased Transcon's size by 135% (p. 7 n. *** *supra*).

Unless Transcon's acquisitions may properly be immunized under Section 5(2) of the Interstate Commerce Act, they are clearly violative of Section 7 of the Clayton Act. This Court has consistently struck down acquisitions when there has been a prior history of acquisitions and concentration in an industry. [*United States* v. *Continental Can Co.*, 378 U. S. 441 (1964); *United States* v. *Aluminum Co. of America*, 377 U. S. 271 (1964); *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 365 n. 42 (1963); *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 345-46 (1962)]. The Court summarized this underlying policy of Section 7 in the *Continental Can* case as follows (378 U. S. at 461-62):

> "Where there has been a 'history of tendency toward concentration in the industry' tendencies toward further concentration 'are to be curbed in their

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(*Footnote continued from previous page*)

independents (R. 53—Exh. 2 and appellants' Exceptions dated Jan. 3, 1966 at pp. 5-8). Transcon could expand its 45,575 route miles by filling these competitive voids instead of merely "cream skimming" as in the challenged acquisitions.

** These figures are derived from Exhibits 21 and 76 before the Commission (R. 53). Although Transcon submitted both of these exhibits, the figures vary. We assume the larger figures to be accurate.

> incipiency.' . . . Where 'concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great.' . . .'' (citations omitted).

Where an oligopolistic situation exists in an industry, this Court has found further acquisitions unlawful even though the acquired company controlled a very small percentage of the relevant market [*United States* v. *Aluminum Co. of America, supra,* at 278 (1.3%); *United Sates* v. *Continental Can, supra,* at 461 (3.1%)]. In *United States* v. *Von's Grocery Co.,* 384 U. S. 270, 272 (1966), the combined companies after the merger controlled only 7.5% of the relevant market.

The Clayton Act prohibition has been held to be so stringent that, present oligopolistic concentration, the Court found violation of the Act without the necessity of elaborate proof of market structure and behavior or probable anticompetitive effects. (*United States* v. *Continental Can, supra,* at 458; *United States* v. *Philadelphia National Bank, supra,* at 363). Condemnation of acquisitions leading to a national duopoly would appear to be a foregone conclusion.

Equally offensive to the Clayton Act are acquisitions which prevent new entry into the field. [*Federal Trade Commission* v. *Proctor & Gamble Co.,* 386 U. S. 568 (1967).] The acquisition of Clorox by Procter & Gamble was found to violate the Clayton Act because, among other reasons it might dissuade new entrants into the bleach field. Mr. Justice Douglas, who wrote the principal opin-

ion for the unanimous court, pointed out particiularly (p. 579):

> "The acquisition may also have the tendency of raising the barriers to new entry.
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> * * *
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> "Thus a new entrant would be much more reluctant to face the giant Procter than it would have been to face the smaller Clorox. [Footnote: The barriers to entry have been raised both for entry by new firms and for entry into new geographical markets by established firms.]"

Addressing himself to the type of proposition relied upon by the Commission in the present case, Mr. Justice Douglas pointed out (p. 580):

> "Possible economies* cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."

In the present instance it was conceded that the only economies would result from size and increased purchasing power, not lower operating costs (p. 20, *supra*).

As pointed out above, the history of the intercity bus industry has been a series of acquisitions routinely approved by the Commission whereby Greyhound and Transcon have bought up scores of companies (App. E, pp.

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* Here there was not even concrete evidence of actual economies. In fact, Transcon plans to continue the acquired companies as separate corporate entities with separate managements. This arrangement is contrary to Commission policy but the Commission has declined to force Transcon to merge these companies (R. 53—Tr. 68, 102-105 & App. B, p. A69).

A147-63). And Transcon's own evidence demonstrated that entry into the intercity bus industry could be attained only through acquisition of existing companies (R. 53—Transcon Brief, Jan. 25, 1965 at p. 76). The present acquisitions have concededly foreclosed any such independent entry by eliminating the last viable nucleus of independent bus systems. Not enough business remains for even a third competitive force (App. H, p. A178).

Violation of the Clayton Act cannot be doubted. The question remains: Can such violation on the present record find shelter under the Interstate Commerce Act?

B. The Interstate Commerce Act Does Not Empower The Interstate Commerce Commission To Shelter The Challenged Acquisitions From The Clayton Act.

The Commission's power to approve, and thereby confer antitrust immunity* upon, the challenged acquisitions resides in Section 5(2)(b) of the Interstate Commerce Act (49 U.S.C. Section 5(2)(b)). That legislation authorizes the Commission to permit acquisition of one carrier by another if it finds that the acquisition "will be consistent with the public interest". "Public interest" is undefined by the statute. Under these circumstances, the Commission's interpretation of the Congressional design is peculiarly subject to judicial review. Irrespective of the Commission's original determination as to what may or may not be consistent with the public interest, it is the Court's "responsibility to say whether the Commission has been guided by proper consideration in bringing the deposit of its experience * * * to bear * * * in [determining] the public

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* 49 U.S.C. Section 5(11).

interest." *Federal Communications Commission* v. *R.C.A. Communications, Inc.*, 346 U. S. 86, 91 (1953).

It can no longer be doubted that the public policy expressed by the antitrust laws is included within the public interest criterion of the statute [*McLean Trucking Co.* v. *United States*, 321 U. S. 67, 86-7 (1944), even more pointedly so stated in the dissent (321 U. S. at p. 93); *Minneapolis & St. Louis Ry.* v. *United States*, 361 U. S. 173, 186 (1959)].

The declaration of Congressional policy introducing the Motor Carrier Act of 1935 not only supports the inclusion of antitrust principles in the "public interest" criterion, but makes it unlikely that Congress intended to empower the Commission to create a national duopoly to the exclusion of competition. Congressional intent declared it (App. D, p. A134):

> "* * * to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, * * * develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense * * *."

The preservation and fostering of "sound economic conditions" among carriers "in the public interest" and the promotion of "adequate, economical and efficient service at reasonable charges" suggests competition. Taken in the context of then existing antitrust policy of the United States, monopoly or duopoly does not appear to have been

the policy which Congress was endeavoring to implement when it enacted the Motor Carrier Act.

Senator Wheeler underscored this proposition when, in introducing the Act, he stated [79 Cong. Rec. 5655 (1935)]:

> "With this limitation, it will be possible for the Commission to allow acquisitions which will make for coordinated or more economical service and at the same time to protect the public against the monopolization of highway carriage by rail, express, or other interest."

The consolidation of the Interstate Commerce Act and the Motor Carrier Act under the Act of September 18, 1940 (App. D, pp. A134-35), did not change in any respect here material the provisions of the Motor Carrier Act. Indeed, the substantial repetition of the Motor Carrier Act declaration of policy in introducing the 1940 Act reemphasizes the concern of Congress with the preservation of the competitive system (*ibid.*).

On the basis of a specific finding that "ample competition would remain," a majority of this Court upheld the Commission order under the Motor Carrier Act permitting the consolidation of certain truck lines in *McLean Trucking Co.* v. *United States, supra,* but the reasoning supports appellant's construction of the Act (pp. 86-7):

> "Congress however neither has made the anti-trust laws wholly inapplicable to the transportation industry nor has authorized the Commission in passing on a proposed merger to ignore their policy. Congress recognized that the process of consolidating motor carriers would result in some diminution of competition and might result in *the creation of monopolies. To prevent the latter effect* and to make certain that the former was permitted only where appropriate to fur-

ther the national transportation policy, it placed in the Commission power to control such developments. The national transportation policy requires the Commission to 'promote . . . economical . . . service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, [or] undue preferences or advantages. . . .'' *The preservation of independent and competing motor carriers unquestionably has bearing on the achievement of those ends.''* (emphasis supplied.)*

In the present case, there is and could be no finding that ''ample competition'' remains after the authorized acquisitions. To the contrary, establishment of duopoly was the Commission's aim. The elimination of any independent competitive force was the conceded result. The compression of the national intercity bus industry into a duopoly, eliminating thereby the existence of a viable third competitive force, violates the prohibition against ''the creation of monopolies'' and rejects the Court's emphasis on ''the preservation of independent and competing motor carriers.''

While, as we shall urge in a moment, it may be time to reconsider the majority decision in *McLean* in the light of the Commission's unrelenting march to national duopoly, we believe that, on the factual determinations in the present record, the Commission's decision granting

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* The Commission's Examiner in the present case, while quoting at length from *McLean*, changed the entire meaning of the decision by excising the last three sentences of the foregoing quotation (App. C, p. A121). Only with such deletion could the Examiner find comfort in *McLean*.

Transcon's application cannot be justified even if the majority opinion in *McLean* is still accepted as gospel. The Commission, in its application by application approach to the problem, has not made any findings of fact upon which to justify the complete disregard of established anti-trust law concepts to the end that all independent competition be excluded from the bus industry (pp. 23-26, *supra*).

Relying principally on the decision of this Court in *Seaboard Air Line R. R.* v. *United States*, 382 U. S. 154 (1965) (App. B, pp. A61-62), the Commission revealed its philosophy when it concluded (*id.* at 63-64):

> "The Commission is not bound by any criteria laid down under the Clayton Act, even where it may find that a certain merger or acquisition actually will result in reduction of competition. We may still find that other factors in the public interest outweigh and override the reduction of competition in a given instance. The examiner, in our opinion, did not err in failing to apply in these proceedings those criteria set forth under the Clayton Act."

The *Seaboard* decision does not authorize the total concentration of a national industry to the exclusion of any independent competition. *Seaboard* was based on the Commission's findings (totally absent here) that "the merged lines caried only a small part of the total traffic in the area involved; that ample rail competition would remain therein * * *" (382 U. S. at p. 155). Upon such facts, this Court reversed the determination of the District Court which would have required the Commission to resort to the usual statistical analysis of the relevant product and geographic markets (382 U. S. at 156). *Seaboard* does not

teach the Commission to ignore the criteria of the Clayton Act, for it cited (*ibid.*) *Minneapolis & St. Louis Ry.* v. *United States,* 361 U. S. 173, 186 (1959) and *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 87 (1944), as requiring the Commission to "estimate the scope and appraise the effects of the curtailment of competition . . ." flowing from proposed acquisitions (*id.* at 156). This compels the Commission to examine very broadly the anti-competitive effects inherent in the creation of a national duopoly. The Commission itself in *Seaboard Air Line R. R.—Merger—Atlantic Coast Line,* 321 I.C.C. 122 (1963), quoted from *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 346 (1962) as follows (320 I.C.C. at 129):

> "[T]endencies toward concentration in industry are to be curbed in their incipiency, particularly when those tendencies are being accelerated through giant steps striding across a hundred cities at a time."

Indeed the Commission pays lip service to these decisions in its present opinion (App. B, pp. A61, 63 nn. 11-12), but fails to obey their mandate. The Commission contends that the present acquisitions will increase rather than reduce competition on the east coast (App. B, pp. A64-65). While this is a totally unsupported conclusion even for the east coast area,* it completely ignores the conceded fact

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* The court below, as did the Commission, glosses over the fact of actual competition between Transcon and the acquired companies by pointing out that there is relatively little duplication of service. Duplication and competition are entirely different concepts. The duplication itself was substantial, taking place in the heavily travelled northeast (R. 53—Tr. 332). But the competition entirely overlooked by the Commission and the court was even more extensive. Transcon's own witnesses established that there existed hun-

(*Footnote continued on following page*)

that future competition in the industry is foreclosed by authorizing two companies to control the industry (App. H, p. A178). There can be no finding here that ample bus competition remains or that only a small part of the total national traffic is carried by the duopolists or either of them (*ibid.*).

The duopoly created by the Commission is tantamount to monopoly. As Clair Wilcox has pointed out in *Competition and Monopoly in American Industry*, 11 (T.N.E.C. Monograph No. 21, 1940), duopoly and monopoly are essentially the same. The author concedes that, theoretically, a second source would afford a buyer an alternative supply (*ibid.*):

> "But it is unlikely to afford him any real alternative in quality, service, price or terms of sale. If the two sellers are of equal strength, each must shape his policy with an eye to the action of the other. If they are of unequal strength, the weaker will usually follow the lead of the stronger. In either case, an understanding governing production and price is readily to be attained. In their essential character and in their ultimate effects, duopoly and monopoly are the same."

Subsequent action by the Commission demonstrates only too clearly its substitution of the cartel for competition.

(*Footnote continued from previous page*)

dreds of miles of route competition between Transcon and the acquired companies; each was part of a separate route system from Dallas to the northeast. Indeed, the pooled operations involving the companies acquired by Transcon carried more passengers through the southern New Orleans gateway than Transcon carried over its own lines through the St. Louis gateway (R. 53—Tr. 84, 384. Also see Tr. 267-71, 444, 928, 936 and 1072-3). Such competition has been eliminated by the Commission's order.

In the case at bar, the Commission justified its approval of Transcon's acquisition so that Transcon might be a more formidable competitor of the "giant" Greyhound. But five months later, in the *Greyhound Corporation-Control-Texas, New Mexico & Oklahoma Coaches, Inc.* (101 M.C.C. 655), the Commission, applying precisely the same rationale, permitted Greyhound to acquire an independent company operating in the southwest. The theory this time was that Greyhound needed to make the acquisition in order to compete more effectively with Transcon "which now has a majority of route mileage in Texas" (*id.* at 671-72).*

And so the vicious circle is complete. In its piece-by-piece consideration of each acquisition, the Commission justified Transcon's aggrandizement on the ground that Greyhound needed competition. Then it justified additional Greyhound acquisitions on the same rationale. Such reasoning will justify the devouring of the few remaining isolated independents by one system or the other in order to maintain the balance between the giants created and nurtured by the Commission. As a natural consequence, the existence of any effective third competing force has been completely destroyed, entry into the business is barred, and the antitrust policy of the United States has been totally thwarted.

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* In order to refute Transcon's argument that Greyhound dominates the bus industry, the Commission said Greyhound was an old system but that "the Continental system has grown at a faster rate recently" (101 M.C.C. at 673 n. 12). Between 1952 and 1962 Greyhound's route miles had increased only 5% while Transcon's had almost doubled (*ibid.*). Including the present acquisitions, they have increased 135% since 1952. Over the same periods, the number of regular route miles of intercity bus operation *has declined* (Interstate Commerce Commission, *Annual Reports*, 1952-1964).

Even the Justice Department recognizes this problem now. It vigorously opposed Greyhound's application for control, *supra*, on the ground that the acquisition:

> "would seriously reduce the bus routes that could be joined together in competitive through services or a third system, and thus make these possibilities for additional competition less feasible" (Justice Department Petition for Reconsideration, April 14, 1967, p. 5).

After noting the Commission's approval of the acquisitions under attack in the present case, the petition also states (p. 2):

> "If the Commission's actions in the pending cases permit Greyhound's acquisitions, the effect will be to further the aggregation of all bus lines into two systems, and to end the possibility of a viable competition evolving from the healthy group of independent carriers . . ."

The present decision has brought about in the bus industry the very pattern which the dissenting opinion in *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 94-5, forecast:

> "But if the Commission is allowed to take the other view, a pattern of consolidation will have been approved which will allow the cartel rather than the competitive system to dominate this field. History shows that it is next to impossible to turn back the clock once such a trend gets under way." (footnote omitted).*

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* The perspicacity of this observation and that of Attorney General Olney in 1892 (See Jaffe, *Judicial Control of Administrative Action*, 12 n. 6 (1965) is confirmed by the duopoly and Senator Hart's comments recorded in 37 *Antitrust Law Journal*, 275, 279 (1968).

As a consequence it may be time to consider whether this Court should lay down additional guide lines to govern the Commission's actions in acquisition proceedings. Professor Fulda, in *Competition In The Regulated Industries—Transportation* (1961), after reviewing the Commission's somewhat erratic course toward concentration in the motor carrier industry, concluded (*id.* at 160-1):

> "The Commission has been charged with discrimination against small carriers and fostering a 'dramatic increase' in trucking concentration. This overlooks the fact that the Commission has no explicit or unqualified mandate to prevent concentration. *The real quarrel of the critics,* as Professor Jaffe suggested, *is therefore* with Congress for failing to provide for such specific mandate or *with the Supreme Court for failing to resolve the conflict between Section 7 of the Clayton Act and Section 5 of the Interstate Commerce Act along the lines suggested by the dissent in the McLean Trucking Co.* case." (emphasis added).

Should this Court, in the light of present developments, draw closer to the view of the dissent in *McLean,* it would follow *a fortiori,* that the Commission's action in the present case cannot be sustained. This record shows no necessity or need requiring "the antitrust laws * * * to give way" (321 U. S. at p. 94).

The report of the Attorney General's National Committee to Study the Antitrust Laws (March 31, 1955) in its section dealing with "Mergers" in "Regulated Industries" espoused the dissent in *McLean,* stating (at p. 270):

> "Where Congress has been silent, the basic policy of our antitrust laws requires the Court's conclusion that competition, at least where all other considerations in-

volved are equal, is in the 'public interest.' In all instances, the courts, in reviewing agency discretion, should recognize that 'administrative authority to grant exemptions from the antitrust laws should be closely confined to those (instances) where the * * * (regulatory) need is clear.' "

Neither the record nor the findings of the Commission show any clear need for the creation of a national duopoly in the bus industry.

C. Procedurally The Commission's Decision Cannot Stand—The Express Failure To Consider The General Effect Of The Acquisitions Upon The Industry Requires Reversal.

The Examiner and the Commission failed to consider the desirability of maintaining the Queen, Safeway and Virginia systems as a viable nucleus of independent companies (pp. 23-26, *supra*). They also failed to examine whether the public interest required such an alternative to the exclusive duopoly presented by the Transcon application (App. H, p. A178). They refused to engage in any economic study on this score and refused to consider appellants' tendered evidence on this subject (pp. 21-23, *supra*).

This failure of the Examiner and the Commission to consider anything but the bare bones of the specific acquisition applications before them would appear alone sufficient to lead to a vacating of the Commission's order. In *Baltimore & O. R. R.* v. *United States,* 386 U. S. 372 (1967), the Commission's approval of the Penn Central merger was upset by reason of the Commission's failure to determine the ultimate fate of three small independent roads affected by that merger. While not dealt with specifically in the opinion of the Court, the concurring opinion of Mr. Justice Brennan

indicates plainly that the Commission's action in the *Penn Central* case was motivated by the same philosophy which caused the Commission to shut its mind in the present case to appellant's tendered evidence and contentions relating to the desirability of maintaining in the industry an adequate third competitive force. Thus, Mr. Justice Brennan pointed out (386 U. S. at 412):

> "The Commission's duty to consider all the relevant effects of a consolidation before authorizing it extends, moveover, not only to whether an inclusion necessary to make the proposed transaction consistent with the public interest is in fact attainable, *but also to whether such an inclusion, even though attainable, might set in motion events which could put the basic transaction proposed in a less favorable light.*"

In the case at bar the preservation of a viable third competitive force was a factor which might well place the proposed transaction in a less favorable light.

In *Baltimore & Ohio,* Mr. Justice Brennan dwelt at substantial length upon the power and the duty of the Commission "to develop complete records with respect to the public interest in particular merger proceedings" (386 U. S. at 427). Quoting from a Congressional Report dealing with the Commision, he said the Commission (*id.* at 429-30):

> " 'is not intended to be a passive arbiter but the 'guardian of the general public interest,' with a duty to see that this interest is at all times effectively protected.' * * * Rather, the agency's duty is to weigh alternatives and make its choice according to its judgment how best to achieve and advance the goals of the National Transportation Policy." (citations omitted).

In language entirely apposite to the Commission's failure to consider appellant's tendered evidence and refusal

to assign an economic expert to testify in the proceeding is Mr. Justice Brennan's further condemnation of the Commission's action in the *Penn Central* merger (*id.* at 431):

> "Although a case-by-case adjudication may offer advantages in flexibility and continual exposure to concrete situations, 'the disadvantages of developing policy through a sequence of limited cases are both numerous and impressive.' H. R. Doc. No. 678, *supra*, p. 81. A significant disadvantage is that individual proceedings 'seldom if ever produce sufficiently comprehensive records for the adequate solution of questions of major importance.' *Id.*, at 82. Obviously, without all the relevant facts, the chance of a satisfactory disposition is diminished. Although the ICC has tools to assemble complete factual records, it employed virtually none of them in these highly interrelated proceedings * * *."* (citations omitted)

The Commission's simplistic approach required only the almost mechanical determination of whether the financial terms of the proposed acquisition were reasonable. This neat approach to the problem excludes all consideration of the future desirability of a duopoly, excludes all consideration of accommodation between the antitrust policy and the simple economies of a merger, and has lead, in essence, to the Commission approval of substantially every acquisition merger requested by the established duopolists (App. E, pp. A147-63).

So without any consideration of the basic issues, the Commission has eliminated the only remaining effective competitive group of bus systems. It has made it impossible

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* See also Fulda *Recent Transportation Mergers*, 48 Minn. L. R., 723, 727-8 (1963).

for appellant, or anyone else, to present an application to the Commission for the acquisition of these companies and the subsequent combination of such a nucleus with the few other remaining independent companies to form at least one effective competitive force to challenge the Greyhound-Transcontinental duopoly.

SECOND—The Commission, Prior To Granting Transcon's Application Under Section 5(2) Of The Interstate Commerce Act, Should Have But Did Not Consider Preapproval Violations Of The Clayton Act By Transcon; The Commission Improperly Aborted Its Proceeding Under Section 11 Of The Clayton Act.

When it became apparent that the Commission in the Section 5 proceeding refused to consider the effects of Transcon's acquisitions of stock in Safeway, Virginia, Queen and certain other affiliated companies, consummated prior to obtaining the Commission's approval, appellant invoked Section 11 of the Clayton Act.

The partial disclosure (R. 53—Exh. 168) of the depositary receipt acquisitions throwing grave doubt on the Scheitel-Love-Moore testimony (pp. 26-31, *supra*) was, in appellant's view, the final fact necessary to tie together in a premeditated plan Transcon's activities locking up, to the exclusion of all others, the independent nucleus of bus companies in which appellant was interested.

So, on August 20, 1965, appellant suggested to the Commission (R. 41-48) that Section 7 of the Clayton Act had been violated and that, accordingly, the Commission was

under duty to issue a complaint by virtue of Section 11(a) and (b) of the Act, 15 U.S.C. § 21(a), (b) which provides:

> "(a) That authority to enforce compliance with sections 2, 3, 7 and 8 of this title by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended . . ."
>
> * * *
>
> "(b) Whenever the Commission . . . vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7 and 8 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges . . ."*

After a lapse of over three months, the Commission on November 30, 1965, advised appellant that it should file its own complaint with the Commission if it believed that there had been a violation of Section 7 (R. 53—Letter from ICC dated Nov. 30, 1965). This was hardly a discharge by the Commission of its duty under Section 11. But rather than dispute with the Commission appellant on December 8, 1965 transmitted an extensive verified complaint (in letter form) to the Commission setting forth the claim that sixteen named respondents including Transcon had violated Section 7 of the Clayton Act (R. 41-42).

The charges were, briefly, that prior to obtaining any consent from the Commission under Interstate Commerce

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* Provision is thereafter made for appearance, answer to the complaint and hearings. If, upon such hearing, the Commission "shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing * * * and shall issue a cease and desist order as well as an order for divestiture." Clayton Act § 11(b), 15 U.S.C. § 21(b).

Act Section 5 Transcon, pursuant to a plan to create a duopoly and exclude all others including appellant from the industry, had (a) acquired 21% of the stock of Safeway (*id.* at 2); (b) had acquired by purchase of depositary receipts substantial stock interests in Virginia Stages (4%), Queen (10%) and a related corporation, General Realty and Insurance Company (GRIC) (16%) (*id.* at 4), which owned bus terminals and also one-third of Georgia-Florida Coaches, Inc., another interstate bus carrier (*id.* at 2); (c) had acquired control of Queen, Virginia Stages and GRIC by virtue of requiring the deposit of all of the shares of the stock of these companies in exchange for irrevocable depositary receipts (*id.* at 3); and (d) had acquired, through the acquisition of Queen, Eastern Carolina Corporation, an intrastate carrier (*id.* at 5).* There were further detailed charges concerning the method pursued by Transcon to consummate its plan, including the charge that Transcon had endeavored to conceal its acquisitions of Queen and GRIC depositary receipts by misrepresentations to the Commission and the United States government (*id.* at 8).

Upon receipt of appellant's letter, the Commission issued it as a complaint under Section 11 and assigned to it Docket No. MC-C-4969 (R. 41-73). It served copies of appellant's letter-complaint on the sixteen defendants named therein and on the Attorney General as required by Section 11 of

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* This acquisition of Eastern Carolina was a condition to the acquisition of Queen (pp. 12-13, *supra*). Transcon, however, at no time made the acquisition of Eastern Carolina a part of its Section 5 proceeding as it was required to do. *Pacific Greyhound Lines-Control & Merger-Geronimo Lines,* 56 M.C.C. 415, 433 (1950), but in Transcon's 1966 Annual Report (p. 12) it confirms its purchase of Eastern Carolina.

the Clayton Act (*ibid.*). On January 24, 1966, appellant requested that the Section 11 complaint be amended to include specifically Transcon's acquisition without Commission approval of the GRIC stock and also of the capital stock of Water Street Equity Corporation, which controlled a substantial amount of the stock of Virginia Stages (R. 53—Supplemental Complaint, Jan. 24, 1966). The Commission accepted this amendment on February 17, 1966 and issued it as as a supplemental complaint in the Section 11 proceeding. The named respondents including Transcon filed answers (R. 53).

At this point, however, the Commission's activities under Section 11 of the Clayton Act came to a halt. No hearings were ever held and on May 18, 1966, the Commission on its own motion dismissed the complaint without ever passing on the merits, solely on the ground that it "referred to facts of record and matters at issue" in Transcon's applications brought under Section 5(2) of the Interstate Commerce Act (R. 41-74). But in the Section 5(2) proceedings, the Commission ignored these issues and granted Transcon's application on the theory that it was "not bound by any criteria laid down under the Clayton Act" (App. B, p. A63).

The Commission was empowered to issue a Section 11 complaint only if it had "reason to believe that any person is violating or has violated any of the provisions" of certain Sections of the Clayton Act [15 U.S.C. Section 21(b)]. Having issued the complaint it was required to hold hearings and then reach a decision on the merits. (*ibid.*) The Commission having done neither, never decided whether or not Transcon had violated the Clayton Act and, accordingly, it never determined in the Section 5(2) decision

whether, in the light of the violation of the Clayton Act, the granting of Transcon's application was in the public interest. Such Clayton Act violation should have presented as potent a reason for denying the Transcon application under Section 5(2) as the preapproval violation of Section 5(4) of the Interstate Commerce Act presented for denying the application in *Gilbertville Trucking Company* v. *United States,* 371 U. S. 115 (1962). (See p. 75, *infra*).

Many facts and matters were presented in the Section 11 complaint which were not encompassed at all in the Section 5(2) proceeding. But if all facts and matters had been identical, it is now beyond question that the legal principles applicable in a Clayton Act Section 11 proceeding differ substantially from the principles and criteria to be applied in resolving a Section 5 application. Consequently, a preapproval violation of Section 7 of the Clayton Act might well have been found even though as a *de novo* proposition in the Section 5(2) proceeding the Commission might have been willing to grant prospective immunity.

This conclusion would seem to follow, *a fortiori,* from the decision in *Denver R.G.W.R. Co.* v. *United States,* 387 U. S. 485, 501-2. This Court there found error in the Commission's refusal to decide whether Section 7 of the Clayton Act had been violated in a proceeding brought under 20(a) of the Interstate Commerce Act. The Commission had urged that its postponement of this question was appropriate as a Section 5 control proceeding in which anticompetitive effects would be considered would have to be brought before Greyhound could establish its control over REA. The majority of the Court disagreed. The Court

held that permission to issue stock under 20(a) could be granted only if the acquisition contemplated thereby was not suspect under Section 7 of the Clayton Act. The Court discussed the differences between the Clayton Act standards and a Section 5 proceeding thus (387 U. S. at 501-2):

> "But the duty under § 5, as we point out above, arises only after the threshold fact of control is established. No such preliminary finding need be made to trigger the ICC's duty under the Clayton Act. A company need not acquire control of another company in order to violate the Clayton Act. See, *e.g., United States* v. *du Pont & Co.,* 353 U. S. 586; *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.,* 152 F. Supp. 387 (D.C.S.D.N.Y. 1957), aff'd, 259 F. 2d 524 (C. A. 2d Cir. 1958). Section 7 proscribes acquisition of 'any part' of a company's stock where the effect 'may be substantially to lessen competition, or to tend to create a monopoly.' Moreover, the purpose of § 5 is significantly different from that of the Clayton Act. * * * the Clayton Act is prohibitive, and imposes a positive obligation upon the ICC to act."

The acquisition of 21% of the stock of Safeway, of some 10% of the Queen stock and 4% of the Virginia stock through the acquisition of the depositary receipts, added to locking up all of the Queen and Virginia stock by requiring irrevocable deposit thereof (p. 14, *supra*) was ample basis for finding a violation of Section 7 of the Clayton Act even though the Commission in the Section 5 application did not consider the percentages sufficient to establish control.*

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* The Commission has, in the past, found the acquisition of as little as 6.2% of the outstanding common stock of a company to

(*Footnote continued on following page*)

If violation of Section 7 had been found there is at least some doubt whether or not the Commission had the power in a Section 5 proceeding to grant approval to such an acquisition. In *Minneapolis & St. Louis Ry.* v. *United States,* 361 U. S. 173 (1959), a complaining intervenor made the specific argument that the Interstate Commerce Commission had no power, in an acquisition proceeding, to immunize a preapproval violation of the antitrust laws. This Court left the question open for it found that there had been no preapproval violation of Section 11 of the Clayton Act. The Court said (p. 191):

> "Minneapolis contends that § 5(11) operates only *in futuro* and confers 'no authority to purge the taint of a transaction illegal at the time it was brought to the Commission.' Whether there is merit in that contention, as a legal abstraction, we need not decide, for here the existing contractual arrangements . . . look entirely to the future."*

Irrespective of whether the Commission may ultimately be held to have the power in a Section 5 proceeding to condone preapproval violations of the antitrust law, its failure in the present case to pursue its Section 11 complaint to a conclusion is plainly erroneous. It is one thing to condone

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(*Footnote continued from previous page*)

violate both Section 7 of the Clayton Act and Section 5(4) of the Interstate Commerce Act. *Chesapeake & Ohio Ry.—Purchase,* 271 I.C.C. 5, 17 (1948); *I.C.C.* v. *Baltimore & Ohio R.,* 160 I.C.C. 785 (1930); Fulda, *Competition in the Regulated Industries: Transportation,* 58 (1961).

* *Carnation Co.* v. *Pacific Westbound Conference,* 383 U. S. 213 (1966), still seems to leave the matter unsettled although it held that an act performed prior to statutorily required Commission approval was vulnerable in a private treble damage action regardless of its immunizable nature.

a violation of the law found to exist; it is quite another for the Commission to shut its eyes to violations charged and reach a decision without ever determining whether a pre-approval violation had or had not taken place. The Section 11 complaint should have been disposed of on the merits before the Interstate Commerce Act Section 5(2) application was adjudicated.

THIRD—The Court Below Should Have Granted Relief Addressed To The False Testimony and Deliberate Concealment Of The Facts With Which Transcon Supported Its Application In The Interstate Commerce Commission.

The court below should have, but did not, apply the principles of *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U. S. 238 (1944), to grant relief addressed to the use of false testimony and concealment of facts by Transcon in presenting its application. In *Hazel-Atlas* the officials of the Hartford Company, while an application for patent was pending, had written an article describing the patented device as one of two "revolutionary devices" with which labor skilled in bottle blowing had been confronted. The Hartford officers procured the president of a glass workers' union to sign the article. It was published under his name and subsequently made a part of the record in support of the application pending in the Patent Office. The patent having been granted, litigation to enforce the patent ensued. The spurious article formed part of the file wrapper history introduced in evidence in the District Court. The bill having been dismissed in the District Court on the ground of no infringement, Hartford appealed.

The attorneys for Hartford, one of whom had played a part in preparing the spurious article for publication, directed the Court's attention to "the article by Mr. William Clarke, former president of the Glass Workers' Union." The Court of Appeals, in its opinion upholding the patent and holding it infringed, quoted from the article to show that labor organizations of practical workmen recognized the new and differentiating elements of the patent. Long subsequently, the spurious nature of the article was discovered and Hazel-Atlas brought a bill of review to vacate the judgment in the Court of Appeals. That court, while finding the facts as above stated, refused relief on grounds that the spurious publication was not the primary basis for the Court's decision upholding the patent, that the fraud was not newly discovered, and that the Court lacked power to set aside the decree of the District Court because of the expiration of the court term in which the original decision was rendered. This Court reversed in an opinion here apposite (322 U. S. at 246-47):

> "We cannot easily understand how, under the admitted facts, Hazel should have been expected to do more than it did to uncover the fraud. But even if Hazel did not exercise the highest degree of diligence, Hartford's fraud cannot be condoned for that reason alone. This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. • • • Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. • • •

> "The Circuit Court also rested denial of relief upon the conclusion that the Clarke article was not 'basic' to the Court's 1932 decision. Whether or not it was the primary basis for that ruling, the article did impress the Court, as shown by the Court's opinion. Doubtless it is wholly impossible accurately to appraise the influence that the article exerted on the judges. But we do not think the circumstances call for such an attempted appraisal. Hartford's officials and lawyers throught the article material. * * * They are in no position now to dispute its effectiveness. Neither should they now be permitted to escape the consequences of Hartford's deceptive attribution of authorship to Clarke on the ground that what the article stated was true. Truth needs no disguise."

This salutary language applied to a spurious article introduced in the Patent Office and referred to in a brief filed in the Court of Appeals. It applies, *a fortiori,* to the sorry record here disclosed. We are dealing with a concerted plan by three witnesses, the three principal officers of the corporations involved in a transaction for which Commission approval was sought to give false and misleading testimony; testimony known by Transcon's attorney to be false and misleading; testimony cited by Transcon and relied on by the Commission to support its conclusion that there had been no partial consummation of the Queen stock acquisition prior to Commission consent. Transcon's attorney emphasized the deceit by nondisclosure of facts known to him and active concealment of the truth in briefs and other arguments (pp. 26-31, *supra*). The truth was not disclosed to the District Court when Transcon succeeded in vacating a temporary restraining order against consummation of the challenged acquisitions. It was not until after the acquisitions had been consummated and prior to the

final argument in the court below that the appellees, apparently through some belated investigation by Commission's attorney brought at least some of the facts to light.*

The elements of fraud and deceit found in *Hazel-Atlas* are compounded here. The extraordinary view of the court below that this testimony was not really very false because the record shows only the purchase of depositary receipts with Transcon's funds by Transcon's officers for a Transcon subsidiary and not an agreement to do so (App. A, p. A15), constitutes an almost unbelievable surrender to Transcon's Alice-In-Wonderland argument. It means, for example, that Love, the president of Queen, who had just negotiated with Goff, Scheitel and Moore for the acquisition of Queen by Transcon, just happened to place his depositary receipts in the hands of brokers, who just happened to find for these unknown securities a buyer, which just happened to be a subsidiary of Transcon and that the catalysts for the sale just happened to be Transcon's own funds and the very officers of Transcon who had personally theretofore negotiated the basic acquisition with Love.

Whether or not this fairyland approach to the record is accepted is not material. However the challenged evidence may be read, the testimony of the three principal witnesses was concededly false.** The executives of Transcon

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* The *ex parte* disclosure then made in appellee's briefs (pp. 15, 30-31, *supra*) leave many questions unanswered. Only the production of witnesses with adequate examination and cross examination will unearth the whole truth. The court below was requested to hold hearings for this purpose but declined (R. 67—150-51).

** While only Scheitel's testimony has been conceded to be unquestionably false (App. F, p. A166), this concession, together with the admissions and facts of record, of necessity taints the other testimony as well.

and Queen and Transcon's attorney believed it beneficial to prosecution of Transcon's application in the Interstate Commerce Commission to have such false testimony in the record. Under these circumstances, the principles established by this Court in *Hazel-Atlas, supra,* are completely applicable. This Court there rejected the contention that the spurious article may not have influenced the Court of Appeals materially and further that the contents of the article were true. This Court stated that having used the article the officers and lawyers for Hartford "are in no position now to dispute its effectiveness. * * * Truth needs no disguise" (322 U. S. at 247).

At the time when the false testimony was given, the stakes were high. The acquisition of the Queen stock, as well as the application to the Interstate Commerce Commission for approval thereof, were conditioned upon obtaining an Internal Revenue Service ruling that the transaction would have no tax consequences for the Queen stockholders (pp. 11-12, *supra*). The payment of any cash by Transcon to Queen's stockholders, if held to be connected directly or indirectly with the acquisition, would have forfeited its tax free status, and so killed the acquisition (pp. 12-13, *supra*).

Transcon's officials and attorneys, furthermore, were undoubtedly acquainted with decisions by the Commission that partial consummation of a transaction prior to Commission approval would constitute a violation of Section 5(4)*

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* The transaction to be approved by the Commission in a Section 5 proceeding is the entire transaction, including all of its different elements. *Texas & N. O. R. Co.* v. *Brotherhood of Railroad Train-*

(*Footnote continued on following page*)

and might lead to a denial of an application, particularly where the application for approval lacked full disclosure.**

So nondisclosure of the cash purchase of depositary receipts appeared essential to insure a favorable decision permitting Transcon's huge acquisitions. Transcon's officers and counsel decided that perjured testimony was worth the risk. Under these circumstances, as in the *Hazel-Atlas* case, Transcon is in no position now to claim that the testimony was not effective to produce whatever result Transcon intended by it.

The gravity of Transcon's offense is underscored by 18 U.S.C. Section 1505, which forbade Transcon corruptly to influence the Commission or "endeavor to influence, ob-

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men, 307 F. 2d 151, 159 (5th Cir. 1962), *cert. denied*, 371 U. S. 1952 (1963); *Marcell-Purchase-Rowley*, 50 M.C.C. 699, 701 (1948). Collateral cash payments, even though not required by the contract submitted to the Commission, are, nevertheless, part of the transaction and constitute partial consummation of the acquisition for which approval is sought. *McNamara Motor Exp., Inc.-Purchase-Rainbow Exp., Inc.*, 55 M.C.C. 357, 365 (1949); *Refiners Transp. & Term. Corp.-Purchase-Petroleum*, 39 M.C.C. 662, 663 (1944); *System Tank Lines, Inc.-Purchase-Lang Transp. Corp.*, 59 M.C.C. 724, 730 (1953). So a cash acquisition of stock by means of purchasing the depositary receipts, whether a part of the contract submitted to the Commission or not, would have been considered by the Commission as a partial consummation without prior Commission approval. See cases above cited and particularly *System Tank Lines, Inc.-Purchase-Lang Transp. Corp.*, 59 M.C.C. 724, 730 (1953).

** *Watson Brothers Transp. Co.-Lease-Burnett & Feighner*, 55 M.C.C. 277 (1949); *Brown Ex.-Purchase-Jones Motor Freight Lines, Inc.*, 55 M.C.C. 127, 130 (1948); *Raymond Bros. M. Transp., Inc.-Purchase-North American*, 37 M.C.C. 431 (1941). The foregoing decisions merely follow the principles dealing with violations of Section 5(4). See *Gilbertville Trucking Co.* v. *U. S.*, 371 U. S. 115 (1962); *Lombard Bros., Inc.* v. *U. S.*, 226 F. Supp. 905, 908 (D. Conn. 1964).

struct or impede due and proper administration of law * * * by the Commission." It is a violation of this statute to endeavor to obtain agency action by lies; bribery is not the only method of corruption. *United States* v. *Polakoff*, 121 F. 2d 333, 335 (2nd Cir. 1941).

Furthermore, perjury appears to have been committed in violation of 18 U.S.C. Section 1621. The concession that the Scheitel testimony was unquestionably false (App. F, p. A166) is, for present purposes, dispositive as to Scheitel. But the concession is really broad enough also to cover Moore and Love. This is particularly true as the oath administered to the witnesses is not only to tell the truth, but to tell the whole truth, which was here most effectively concealed.

What has been said points to the flaws in the decision of the Court below. We have analyzed the Court's hypertechnical suggestion (App. A, pp. A14-18) that the testimony in question might be construed to mean that Transcon had not been party to a pre-existing agreement to buy the depositary receipts for cash. The Court's conclusion from this tenuous premise is hardly in keeping with the judicial duty imposed by *Hazel-Atlas*. According to the Court, absent direct evidence that there was a pre-existing agreement to buy depositary receipts, it was not material that Transcon had in fact bought the certificates with its own funds through its own officers in the name of one of its subsidiaries. Therefore false testimony on this point could be disregarded.

Whether or not there be adopted appellant's view that the circumstantial evidence unerringly points to the existence of an agreement by Transcon to furnish cash to such

of the Queen stockholders as required it, the fact still remains that the Scheitel-Love-Moore testimony was false. Scheitel did know who purchased the depositary receipts but in his testimony he denied it. Love most certainly knew who purchased his depositary receipts and who had made a market for them but in his testimony he denied it. Moore most certainly knew that there was an agreement by Transcon to furnish funds for the purchase of the depositary receipts but he denied it. The agreement concerning which he was asked was not any pre-existing agreement with the Queen stockholders, but any agreement. The record, as it presently stands, discloses that depositary receipts were sold through First Securities Corporation, which was placed in funds by Transcon through an arrangement with one of Transcon's officers or its attorney. This is an agreement, the existence of which Moore deliberately denied. The administrative process was corrupted by such false testimony and the failure of Transcon's counsel to purge it. This is enough to invoke *Hazel-Atlas*.

Such a conclusion is abundantly supported by *F.C.C.* v. *WOKO, Inc.*, 329 U. S. 223 (1946). There this Court reversed the Court of Appeals which, in turn, had reversed an order of the Federal Communications Commission denying an application by virtue of applicant's presentation of false testimony. This Court said (pp. 226-227):

> "It is said that in this case the Commission failed to find that the concealment was of material facts or had influenced the Commission in making any decision, or that it would have acted differently had it known that the Pickards were the beneficial owners of the stock. We think this is beside the point. The fact of concealment may be more significant than the facts

concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones. We do not think it is an answer to say that the deception was unnecessary and served no purpose. If the applicant had forthrightly refused to supply the information on the ground that it was not material, we should expect the Commission would have rejected the application and would have been sustained in so doing. If we would hold it not unlawful, arbitrary or capricious to require the information before granting a renewal, it seems difficult to say that it is unlawful, arbitrary or capricious to refuse a renewal where true information is withheld and false information is substituted."

The Court below takes the position that even if the Scheitel-Love-Moore testimony was false and misleading, it would not constitute a fraud unless the Commission was shown to have been materially misled thereby (App. A, p. A13). Such a conclusion also misreads the lesson taught by *Hazel-Atlas* as well as *WOKO*. It was there held sufficient that fraud was perpetrated. The perpetrators were held estopped to question the materiality or effectiveness of the deceit. The willingness to deceive an administrative body, as well as the courts, is sufficient to deprive the perpetrators of the deceit of administrative or judicial benefits resulting from the tainted proceeding. That the deception may have proved immaterial, unnecessary or even useless, does not save the wrongdoer from the consequences of *Hazel-Atlas* or *WOKO*.

In any event, the opinion of the court below is based upon a mistaken premise. The fact is that the Commission was misled by the false testimony. It is only that

testimony which was cited in the court below by the Commission's counsel to establish that in fact there had been no pre-existing agreement by Transcon to furnish cash to some of the stockholders as a part of the acquisition agreement (R. 54-33-39). Aside from the challenged testimony, there is no evidence in the record to sustain such a conclusion. If, as now appears, the testimony was false, then it is plain that the Commission was in fact misled. Indeed, the court below, strangely enough, was likewise misled in spite of the disclosures and concessions belatedly made by Commission's counsel just prior to the argument. The court below finds (App. A, p. A15):

> "While the I.C.C. report does not contain an explicit finding that there was no secret agreement on the part of Transcon to purchase or make a market for the deposit receipts, the evidence in the record was quite sufficient to support such a finding. Transcon and Queen officials strenuously denied that there was any such commitment, and the Commission was entitled to credit their testimony."

The only evidence in the record and the only strenuous denial by Transcon and Queen officials are the very testimony material parts of which have been conceded to be false.

The court below sustains its position by suggesting that the Interstate Commerce Commission does not claim that it was deceived (*id.* at A15-16). We believe it to be a matter of deep regret that a powerful agency charged with the protection of the public interest and the administration of important laws is so insensitive to the presentation before it of false and deceitful testimony that it failed to take action when its counsel discovers the taint. Instead

we have only the feeble lament of Commission's counsel when he first disclosed the actual facts in the court below: "In our view it certainly would have been preferable, had this information been made available at the hearing . . ." (App. F, p. A164).*

It was the duty of the court below to unearth the entire fraud by hearing if necessary—especially as the fraud reached into the court where disclosure was not made until after the temporary restraining order was vacated on representations by Transcon that the order of the Commission was valid and unassailable (R. 38). (See *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U. S. 575 (1946); *American Insurance Co.* v. *Lucas*, 38 F. Supp. 926 (W. D. Mo. 1941), *app. dismissed per curiam*, 314 U. S. 575 (1941); *Consolidated Gas & Equipment Co. of America* v. *Carver*, 257 F. 2d 111 (10th Cir. 1958); *cf., Petition of Demetrios Devlas*, 31 F.R.D. 130 (S.D.N.Y. 1962); *Klapprott* v. *U. S.*, 336 U. S. 942 (1949); *FDIC* v. *Alker*, 234 F. 2d 113 (3rd Cir. 1956)).

In the alternative, the court below should have remanded with instructions for the Commission to rehear, take additional evidence, make findings and reach conclusions as to appellant's claims.* Appellant, as well as the public, is at least entitled to have all the facts fully developed at a

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* The industry of Commission's counsel in discovering facts leading to his concession that false evidence had unquestionably been presented to the Commission is no substitute for Commission action in the light of counsel's discovery. Cf. *T. I. McCormack Trucking Co.* v. *United States*, 251 F. Supp. 526, 536 (D.N.J. 1966); see also *Powell* v. *United States*, 300 U. S. 276, 298 (1937).

* It is for the Commission, not its counsel, to draw conclusions from the new facts. *T. I. McCormack Trucking Co.* v. *United States*, 251 F. Supp. 526, 536 (D.N.J. 1966); see also *Powell* v. *United States*, 300 U. S. 276, 298 (1937).

hearing and to have findings of fact made thereon by the Commission. If the Commission is of the opinion, after all such facts have been developed, that perjury by two principal officers of Transcon, by the president of Queen and failure of Transcon's counsel to disclose the facts** does not disqualify Transcon from being awarded a duopoly position in the bus industry, then at least such facts and the Commission's conclusion should be spread upon the record.

In a more meticulous decision, the Commission itself pointed the way to the conclusion which it should reach on the facts as now disclosed. *Central of Georgia Control,* 307 I.C.C. 39, 43-44 (1958):

> "The Public interest is concerned not only with improvements in transportation service, but also with the maintenance of respect for and observance of law."

This view has the specific approval of this Court which, in *Gilbertville Trucking Co.* v. *United States,* 371 U. S. 115, 128 (1962), said:

> "As already noted, § 5(4) is integral to the success of the regulatory scheme. To approve a merger in the face of a § 5(4) violation may encourage others whose merger may or may not be consistent with the public interest to either present the Commission with a *fait accompli* or avoid its jurisdiction altogether. As the Commission pointed out in *Central of Georgia,* if such practices were encouraged, 'our administration of the statute in the public interest would be seriously hindered, if not defeated.' 307 I.C.C., at 44."

** The duties of counsel in such a situation are plain (*Kingsland* v. *Darsey,* 338 U. S. 318 (1949); Weinstein, *Judicial Notice and the Duty to Disclose Adverse Information,* 51 Iowa L. Rev. 807 (1966)).

The Department of Justice has also had its more meticulous moments. So relying upon *F.C.C.* v. *WOKO*, 329 U. S. 223, it opposed, because of appellant's lack of candor, the Federal Communications Commission, which had approved the I.T.T.—A.B.C. merger. (Brief of the United States in *United States* v. *FCC*, #21147 USCA, D. C. p. 28). The merger was then abandoned. It is astonishing that on the aggravated facts in the present record the Department has not to date adopted the same salutary position.

Violations of law, including corruption of the very administrative process itself, should not be rewarded by grant of the application prosecuted by such corruption.* The court below should have deprived Transcon of the fruits of its misconduct.

FOURTH—Appellant Has Standing to Sue.

We do not believe that appellant is required to appeal from the discussion contained in Part V of the opinion in the court below (App. A, p. A36). This appears to be gratuitous *obiter dicta*. If the court had thereby intended to hold that plaintiff had no standing to sue, then the balance of the opinion would appear to be totally ineffective. Had the court decided that there was no party plaintiff, there was obviously no case or controversy and no jurisdiction.

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* This has been the general rule. *F.C.C.* v. *WOKO*, 329 U. S. 223; *Lorain Journal Co.* v. *F.C.C.*, 351 F. 2d 824, 830 (D. C. Cir. 1965); *Robinson* v. *F.C.C.*, 334 F. 2d 534 (D. C. Cir.), *cert. denied*, 379 U. S. 843 (1964); *Immaculate Conception Church of Los Angeles* v. *F.C.C.*, 320 F. 2d 795 (D. C. Cir. 1963).

Out of an abundance of caution, however, we indicate briefly the basis for appellant's standing.

Appellant had a tangible concrete expectancy in acquiring the controlling stock of Queen and affiliated companies (pp. 9-11, *supra*). Transcon upon becoming aware of appellant's proposed acquisition, took steps to block it and to acquire this property itself (pp. 11-15, *supra*). Appellant has charged that such acquisition was a part of Transcon's plan to create a total duopoly in the bus business by acquiring the Safeway and Virginia bus systems more or less simultaneously with the acquisition of Queen and its subsidiaries, all for the general purpose of excluding any third competitive force from the bus industry and, specifically, excluding appellant therefrom. Transcon's plan was implemented by filing its applications under Sections 5 and 20(a) of the Interstate Commerce Act in order to obtain the Commission's consent to the transaction and immunity from the antitrust laws. These proceedings, to which appellant had been admitted as a party, were prosecuted by Transcon corruptly with false testimony.

The Commission's action granting Transcon's applications under Section 5 and 20(a) achieved Transcon's aim, excluded appellant from the bus industry and purported to immunize the challenged acquisitions from the ambit of the antitrust laws.

Upon such facts appellant has standing to appeal from the Commission's orders as a "party in interest" under Interstate Commerce Act § 205(g), 49 U.S.C. 305(g)* and likewise as a person "suffering legal wrong because of any

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* The reviewed provisions contained in 28 U.S.C. §§ 2321-2325 contain similar language. See, especially, Section 2323.

agency action, or adversely affected or aggrieved by such action" Administrative Procedure Act § 10(a), 5 U.S.C. § 1009(a).*

Appellant was a potential competitor of Transcon. As such, appellant has standing to pursue its remedies exactly as would a competitor. *South Carolina Council of Milk Producers, Inc.* v. *Newton,* 360 F. 2d 414, 417-18 (4th Cir. 1966); *North Texas Producers Association* v. *Young,* 308 F. 2d 235) (5th Cir. 1962), *cert. denied,* 372 U. S. 929 (1963); *Utah Gas Pipelines Corp.* v. *El Paso Natural Gas Co.,* 233 F. Supp. 955, 964 (D. Utah 1964); *Delaware Valley Marine Supply Co.* v. *American Tobacco Co.,* 184 F. Supp. 440, 443 (E. D. Pa. 1960), *aff'd* 297 F. 2d 199 (3rd Cir. 1961), *cert. denied,* 369 U. S. 839 (1962).** Unquestionably, a competitor which has been adversely affected by an order of an administrative agency has standing to seek judicial review (*American Trucking Assns.* v. *United States,* 364 U. S. 1, 17-18 (1960); *Chicago* v. *Atchison, T. & S. F. R. Co.,* 357 U. S. 77 (1958); *FCC* v. *Sanders Bros. Radio Station,* 309 U. S. 470 (1940); *The Chicago Junction Case,* 264 U. S. 258 (1924)). And a recent decision according standing to the listening public to contest the renewal of a broadcast license, has eliminated the need for economic injury (*Office of Communication* v. *FCC,* 359 F. 2d 994, 1000-06 (D. C. Cir. 1966); see also Comment, "Standing of Television

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* The foregoing appeal provisions in the Motor Carrier Act and in the Administrative Procedure Act appear to achieve indentical results. See *American Trucking Assns.* v. *United States,* 364 U. S. 1, 18 (1960).

** See also *United States* v. *Penn-Olin Chemical Co.,* 378 U. S. 158 (1964); *United States* v. *El Paso Natural Gas Co.,* 376 U. S. 651 (1964), where this Court stressed the elimination of potential competition as an important factor under Clayton Act § 7.

Viewers", 66 Colum. L. Rev. 1511 (1966); Note, "Competitors' Standing to Challenge Administrative Action Under the APA", 104 U. Pa. L. Rev. 843 (1956)).

In *FCC* v. *Sanders Bros. Radio Station, supra,* the Commission had argued that "economic injury to a competitor is not a ground for refusing a broadcasting license and that, since this is so, the respondent was not a person aggrieved or whose interests were adversely affected by the Commission's action . . ." (309 U. S. at 472-73). Construing the Federal Communications Act (47 U.S.C. § 402(b)(6) [at the time of decision § 402(b)(2)]), which sets forth the same criteria for standing to obtain review as are applicable here, this Court rejected the argument. It was held that where a competitor fears financial injury as a result of administrative action issuing a license to another such competitor, he has sufficient standing to prosecute an appeal.

According to 3 Davis Administrative Law Treatise (p. 255):

> "The Sanders doctrine* has been carried over into the ICC field."

As Transcon has received Commission approval to acquire the Queen bus system in the acquisition of which appellant had a tangible contractual expectancy the *Sanders* doctrine is plainly applicable. But appellant's rights under *Sanders,* extend to attacking the Virginia and Safe-

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* Cf. "Standing of Television Viewers", 66 Colum. L. Rev. 1511 at p. 1516, n. 35, in which the author seems to conclude that the statutory scheme for review of I.C.C. orders is more liberal *qua* standing to sue than that in the Federal Communications Act. If so, plaintiff's standing to sue here follows as an *a fortiori* proposition from *Sanders.*

way acquisitions as well for Commission action approving those and the Queen acquisition by Transcon completed the duopoly which excluded appellant from the bus industry entirely.

The recent decision in *Cascade Natural Gas Corporation* v. *El Paso Natural Gas Co.*, 386 U. S. 129 (1967), appears to indicate a trend toward liberality in according standing to be heard in courts on issues such as those involved in the present litigation. Such trend, as one author suggested, may be due to an increasing distrust of certain of the agencies on the ground that these agencies have in fact on many occasions failed to represent the public interest (*Jaffe, Judicial Control of Administrative Action,* 521 (1965)). So here, if plaintiff is not accorded standing, there is no one to bring before the Court the question of whether the creation of a nationwide duopoly in the bus industry is consistent with the aims and purposes of the Interstate Commerce Act.

W. R. Grace & Co. v. *CAB,* 154 F. 2d 271 (2d Cir. 1946), a case involving similar issues to those herein in the air carrier industry, commented on the question of standing to review administrative orders and decisions as follows (154 F. 2d at 286-87):

> "With increasing emphasis, the Supreme Court has admonished us that, in court review of such administrative orders as this now before us, the public interest looms large. Accordingly, since this is not mere private litigation, overly nice scrutiny of the pleadings and undue stress on alleged estoppels have no place here.
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> • • •
>
> "The unmistakable fact is that, of recent years, there has been a steady development in Supreme Court deci-

> sions of the doctrine that those seeking review of the orders of administrative agencies, under review provisions like § 1006 of this Act, 49 U.S.C.A. § 646, are primarily vindicating the public, not a private, interest. It is our duty to follow the lines laid down by that Court, and we have done so here according to our lights.". (citations omitted)

The very fact that this Court has not heretofore been presented with a case involving acquisitions in the intercity bus industry amply demonstrates that the duopolists Transcon and Greyhound, with the cooperation of the Interstate Commerce Commission, have been able to accommodate each other in the achievement of their mutual aims. This is particularly significant in the light of the hundreds of acquisitions which have led up to the final duopoly (App. E, *infra*).

The necessity for according appellant standing is here emphasized by Transcon's prosecution of its applications with the misleading and deceitful testimony to which we have above referred (pp. 26-38, *supra*). The Commission never decided whether or not this evidence was false (although its counsel has now so conceded) and obviously never passed upon the effect of such false testimony in judging the fitness of defendant Transcon to become a duopolist in the bus industry; the Commission appeared more interested in sweeping the whole charge under the carpet. Standing should plainly be accorded to someone to insist that the administrative record be purged of fraud.

Appellant at least has raised its voice in the administrative wilderness. The voice should be heard.

The reference by the court below (Ap. A 38), to a release given by appellant as a result of the settlement of a contract action against certain Queen stockholders is wholly beside the point. The release in no way ran to, or released, the Interstate Commerce Commission or the United States which are the only parties defendant here. Transcon's voluntary intervention waived whatever benefit it may claim from the release. Moreover, even as to Transcon the release did not apply to a review of Commission decision in Transcon's favor or did not cover the consequences of the false testimony which was not unearthed until long after the release was given. Indeed appellant's claim in the court below and here is that the release to Transcon, a non-party in the Carolina action, was fraudulently obtained by virtue of appellant's reliance upon the false testimony of Transcon's officers in the Interstate Commerce Commission proceeding. If such release is claimed to stand in the way of the present action, then the court below should have acceded to appellant's request for hearings to determine the validity of the release. The court below is entirely mistaken in its view that because the release was obtained as a part of a settlement of a North Carolina contract action the release may only be attacked there. A release is nothing but a contract and may be construed, reformed or avoided by any court having jurisdiction of the parties. *Fox Midwest Theatres* v. *Means,* 221 F. 2d 173 (8th Cir. 1955); *Houston* v. *Trower,* 297 Fed. 558 (8th Cir. 1924); *Carter* v. *Twentieth Century-Fox Film Corporation,* 127 F. Supp. 675 (W. D. Mo. 1955); *Mayle* v. *Griss,* 169 F. Supp. 58 (W. D. Pa. 1958).

It goes without saying that a release obtained as part of a conspiracy to violate the antitrust laws* as well as one obtained fraudulently** becomes unenforceable in any proceeding in which its invalidity is established.

Conclusion

Probable jurisdiction should be noted so that the far reaching questions relating to the accommodation of the antitrust laws with the Interstate Commerce Act and the integrity of the administrative process may be resolved.

Respectfully submitted,

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Dated: November 19, 1968

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* *Carter* v. *Twentieth Century-Fox Film Corp.*, 127 F. Supp. 675 (W. D. Mo. 1955); *Fox Midwest Theatres* v. *Means*, 221 F. 2d 173 (8th Cir. 1955); *Westmoreland Asbestos Co.* v. *Johns-Manville Corp.*, 39 F. Supp. 117 (S.D.N.Y. 1941); *Radio Corp.* v. *Raytheon Co.*, 296 U. S. 459 (1935).

** *Chandler* v. *Atlas General Industries*, 215 F. Supp. 617 (D. Mass. 1963); *Neeff.* v. *Emery Transportation Co.*, 284 F. 2d 432 (2d Cir. 1960). *Graham* v. *Atchison, T. & S. F. Ry. Co.*, 176 F. 2d 819 (9th Cir. 1949); *Westmoreland Asbestos Co* v. *Johns-Manville Corp.*, 39 F. Supp. 117 (S.D.N.Y. 1941); *Kosztelnik* v. *Bethlehem Iron Co.*, 91 Fed. 606 (E.D.N.Y. 1898); *Wagner* v. *National Life Ins. Co.*, 90 Fed. 395, 464 (6th Cir. 1898).

APPENDIX A

Interstate Investment Inc.,

Plaintiff,

v.

United States of America and

Interstate Commerce Commission,

Defendants,

and

Transcontinental Bus System, Inc.,

Intervenor-Defendant.

APPENDIX

United States District Court

S. D. New York

July 23, 1965

OPINION

Before Feinberg, Circuit Judge, and Bryan and Bonsal, District Judges.

FEINBERG, Circuit Judge:

This is an action under 28 U.S.C. § 2321-25 to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission.

The order, dated August 10, 1964, granted the applica-